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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 30

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 1, 1953
CERTIORARI GRANTED JUNE 1, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 695

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. 1]

IN UNITED STATES COURT OF CLAIMS

LOUIS LOBER, CHARLES LOBER and ALMA T. LOBER, as executors of the last will and testament of Morris Lober, deceased, Plaintiffs,

against

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed August 26, 1949

To the Chief Judge and Associate Judges of the United States Court of Claims:

The plaintiffs, Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased, by their attorneys, Ehrich, Royall, Wheeler & Holland, respectfully show to this Court:

1. That Morris Lober, the decedent above named, died a resident of the County of Westchester, State of New York, on the 13th day of December, 1942, his will was duly probated and letters testamentary issued by the Surrogate's Court, Westchester County, New York on the 6th day of February, 1943 to your petitioners and to Max Lober.

2. That said Max Lober died on the 7th day of October, 1946.

3. That plaintiffs and said Max Lober acted as executors of the will of said decedent from the 6th day of February, 1943 to the 7th day of October, 1946 and plaintiffs have ever since the 7th day of October, 1946 continued to act and are now acting as surviving executors of said will.

[fol. 2] 4. That said decedent on or about and under date of October 31, 1924, by instrument in writing, set up a trust for the benefit of his son, Robert T. Lober consisting of cash in the amount of $742.02 and 75 shares of stock of Importers and Exporters Insurance Company of a market value on said day of approximately $4,200.00, a true copy of which instrument is annexed hereto as Exhibit A and made a part hereof as if fully set forth in this paragraph.

5. That said decedent on or about and under date of March 15, 1929, by instrument in writing, set up a separate

trust for the benefit of his son, James Morris Lober consisting of cash in the amount of $1,325.50 and 25 shares of stock of National Park Bank of a market value on said date of approximately $22,575.00, a true copy of which instrument is annexed hereto as Exhibit B and made a part hereof as if fully set forth in this paragraph.

6. That said decedent on or about and under date of March 18, 1929, by instrument in writing, set up a separate trust for the benefit of his daughter, Maxine Lober consisting of 50 shares of stock of Public National Bank transferred on or about March 18, 1929 and of a market value on said date of approximately $13,350.00 and cash transferred on or about March 27, 1929 in the amount of $2,709.00, a true copy of which instrument is annexed hereto as Exhibit C and made a part hereof as if fully set forth in this paragraph.

7. That on or about and under date of August 27, 1934, said decedent executed three separate instruments in identical form separately confirming the fact that each of said trusts referred to in paragraphs 4, 5 and 6 of this petition had been duly constituted and had been and was irrevocable, true copies of which three instruments are annexed hereto attached to Exhibits A, B and C and are made part hereof as if fully set forth in this paragraph.

8. That said transfers referred to in paragraphs 4, 5 and 6 of this petition were completed gifts according to the terms of said trust instruments, Exhibits A, B and C hereof, and the principal of said trusts were vested respec-[fol. 3] tively in said Robert T. Lober, James Morris Lober and Maxine Lober.

9. That said Robert T. Lober was born January 11, 1922 said James Morris Lober was born February 7, 1929 and said Maxine Lober was born February 7, 1929; that said three persons constituted at the several times said trusts were set up and at all times subsequent thereto all the children of decedent Morris Lober; and that said three persons all survived said decedent.

10. That at the several times of creation of said three trusts and on August 27, 1934, said decedent Morris Lober enjoyed good health, had ample financial means other than the assets transferred to said trusts and had as his purpose in setting up said trusts the proper education and

training of his children in the management and use of money and property and to provide separate capital funds which each of them could rely on having available at the age of 25 for such purposes as each such child desired separate funds.

11. That said transfers effected by setting up said trusts were not made in contemplation of death, were not part of said decedent's testamentary plan and were not properly includible in the estate of said decedent for estate tax purposes.

12. That the true and correct net estate of said decedent before the statutory exemptions was $660,749.17.

13. That the testamentary plan of said decedent is set forth in his will dated and executed November 24, 1936, a true copy of which instrument is annexed hereto as Exhibit D and made a part hereof as if fully set forth in this paragraph.

14. That the Internal Revenue Agent in Charge of the Upper New York Division of the Internal Revenue Service valued the assets of said three trusts as of December 13, 1942 at $128,139.67 and improperly included in the estate of said decedent the assets of said three trusts in such amount although no part thereof was properly includible as an asset taxable in said decedent's estate.

[fol. 4] 15. That on or about and under date of January 17, 1947, plaintiff, Louis Lober as executor of the will of said decedent, signed a waiver of restrictions and consent to assessment and collection of estate tax on said estate in the sum of $109,917.47 with interest (which resulted from the inclusion of said trust assets and also from other changes in the estate tax schedules as filed) but reserved the right to file a claim for refund on the issue of the propriety of including the assets of said three trusts.

16. That on or about February 19, 1947, plaintiffs as such executors were wrongfully required to and did pay to the Collector of Internal Revenue at Albany, New York, the sum of $129,261.44, which sum included estate taxes in the amount of $39,012.19 improperly assessed by inclusion of the assets of said three trusts plus interest thereon up to February 19, 1947 in the amount of $6,865.62.

17. That on or about and under date of April 23, 1947, plaintiff, Louis Lober, as executor of the will of said de-

cedent, duly filed a claim for refund on Form 843 requesting refund of estate tax in the amount of $39,012.19 improperly assessed and collected as aforesaid and interest improperly claimed and collected thereon up to February 19, 1947 in the amount of $6,865.62 or a total of $45,877.81.

18. That on or about and under date of September 2, 1947, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

19. That the whole of said sum of $45,877.81 has been ever since February 19, 1947 and now is wrongfully and unlawfully retained and withheld from the plaintiffs as such executors and against their will by the United States of America.

20. That no other action than aforesaid has been had on this claim in Congress or by any of the Departments; that plaintiffs and said decedent and the beneficiaries under his will have at all times borne true allegiance to the Government of the United States of America and they have [fol. 5] not in any way voluntarily aided, abetted or given encouragement to rebellion against such Government; that plaintiffs, as such executors, always have been and are the sole and absolute owners of the claim herein presented and have made no transfer or assignment of said claim or of any part thereof or of any interest therein; that they are justly entitled to the amount claimed from the United States of America after allowing all just credits and setoffs; that this claim is founded upon the laws of the United States relating to internal revenue, to wit: the Revenue Act of 1926 as amended and the Revenue Act of 1932 as amended, particularly the sections of said Acts relating to federal estate tax, being sections 300-325 of the Revenue Act of 1926 and sections 401-403 of the Revenue Act of 1932; that this suit is filed under section 1491 of Title 28 of the United States Code entitled "Judicial Code and Judiciary" and sections 3313, 3770, 3771 and 3772 of Title 26 of the United States Code entitled "Internal Revenue Code."

21. That plaintiffs believe the facts as hereinabove stated to be true.

Wherefore, plaintiffs pray judgment against the United States of America, upon the facts and law, in the amount

of $45,877.81 with interest thereon from February 19, 1947 and their reasonable costs and disbursements herein.

Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased, plaintiffs by Ehrich, Royall, Wheeler & Holland, Attorneys for plaintiffs, Office and Post Office Address, No. 20 Exchange Place, Borough of Manhattan, New York 5, New York.

James G. Holland, of counsel.

[fol. 6] EXHIBIT A TO PETITION

Know all men by these presents that I, Morris Lober, of the Borough of Manhattan, City, County and State of New York, hereinafter called the "Donor", for and in consideration of the sum of One Dollar lawful money of the United States to me in hand paid, receipt whereof is hereby acknowledged, and other good and valuable consideration, do hereby sell, assign, transfer and deliver unto myself, as Trustee, for my son, Robert T. Lober, upon the terms, conditions and trusts hereinafter set forth, the property, securities and/or assets set forth in the schedule hereunto annexed, to have and to hold the same and any other property of any kind which the said Trustee may, pursuant to any of the provisions hereof, at any time hereafter receive, hold or acquire (all of which property is hereinafter referred to collectively as the "Trust Estate") in trust, nevertheless, to hold, invest and reinvest the same and to collect and receive the income thereof during the life of said Robert T. Lober, or until he shall have reached the age of twenty-five years, the net income so collected to be never at any time either in whole or in part expended for the maintenance, education and support of said Robert T. Lober during his minority, but accumulated for his benefit in whole or in part, as the Trustee may deem proper, such accumulations of income, if any, to be paid over to said Robert T. Lober upon his reaching his majority, the principal of said Trust Estate or the remaining portion thereof to be paid over to the said Robert

T. Lober when he shall have reached the age of twenty-five years.

The Trustee in his discretion may make payments to said Robert T. Lober from the principal of the Trust Estate, and the amount and time of such payments shall rest in the discretion of the Trustee and any and all of the sums so paid shall be entirely freed from the trust created hereby and shall be the absolute property of the payee.

[fol. 7] The Trustee shall continue any investment which may come into his hands or from time to time invest or reinvest the same in such securities or investments as to him may seem proper, whether legal investments for trustees or otherwise. The Trustee, for the purpose of making purchases for the account of the Trust Estate and/or for the exercise of any rights or options as hereinafter provided, may borrow money and deposit the Trust Estate in whole or in part as collateral therefor, and pay the interest required to be paid upon such loans, and in the purchase and sale of stocks, bonds, notes or other securities for the account of the Trust Estate, he may enter into any agreement in connection therewith any person, firm, bank or corporation, as may be usual and customary in the premises. The Trustee may also sell any or all of the property of the Trust Estate after the termination of the trust created hereby, to facilitate distribution. The Trustee may consent to the reorganization, consolidation, merger or readjustment of any corporation or to the sale to any other corporation or person, of the property of any corporation of which the stocks, bonds, notes or other securities are held by the Trustee hereunder and may do any act with reference to such stocks, bonds, notes or other securities necessary or proper to enable the Trustee to obtain the benefit of such reorganization, consolidation, merger, readjustment or sale, and may hold as part of the Trust Estate any securities or other property which the Trustee may acquire as a result of such reorganization, consolidation, merger, readjustment or sale.

The Trustee further may, in his discretion, exercise any rights or options appertaining or applicable to or granted in connection with any of the stocks, bonds, notes or other securities held in the Trust Estate, and may do all acts

necessary for the exercise of the same and to take advantage thereof.

Whenever any corporation shall declare and pay stock dividends with respect to any of the stock held in the Trust Estate, such stock dividends in any one year, not in excess of six per cent (6%) of the number of shares of such stock [fol. 8] so held in such Trust Estate, shall be treated as income and payable to the beneficiary of the life estate, and any excess shall be treated as principal and added to the principal of the Trust Estate.

The Donor expressly reserves to himself the right to appoint a co-trustee or trustees, or successor trustee or trustees, with limitations as to their powers of investment or otherwise, as he may deem proper, provided such appointment be made in writing and duly acknowledged by him.

In case of the Donor's death before said Robert T. Lober shall have reached the age of twenty-five years, then and in that case Alma T. Lober, wife of the Donor, is hereby appointed Trustee in place and stead of the Donor with the same powers and rights as conferred hereunder upon the said Morris Lober as Trustee, including the right to appoint a co-trustee or trustees, or successor trustee or trustees, with or without limitations, as she may deem proper. This appointment however, shall be revoked in case, during her lifetime, the Donor shall by instrument in writing duly acknowledged, appoint another trustee or trustees, whether such instrument specifically revokes such appointment or not.

In case of the death of the Donor, any co-trustee, substituted trustee or trustees shall make an annual account and such accounting shall be conclusive and binding upon the beneficiary or any one claiming under him, except in case of fraud.

No Trustee shall be liable for any loss by reason of any investment made in good faith, nor for any other loss whatsoever, except such as may arise out of fraud or wilful misfeasance.

The Trustee acknowledges the receipt by him of the property shown in the schedule hereto annexed, and accepts the trust hereby created.

[fol. 9] In witness whereof, this instrument has been executed this 31st day of October 1924.

Morris Lober (LS), Donor, Morris Lober, Trustee.

State of New York,
County of New York, ss.:

On this 31 day of Oct. 1924 before me personally came Morris Lober to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan Cahen, Notary Public N. Y. Co., No. 419—3/30/25.

[fol. 10] Schedule of Property, Securities and/or Assets Oct. 31, 1924

Cash $742.02

75 Importers and Exporters Insurance Co.

[fol. 11] Declaration of Confirmation

Know all men by these presents that I, Morris Lober, did on or about *about* the 31st day of October, 1924, enter into a Trust Agreement with myself as Trustee, for the benefit of my son Robert T. Lober, which said Trust was intended by me to be irrevocable, and accordingly I do hereby declare and confirm that said Trust Agreement was at the time of its execution and now is and shall continue to be irrevocable in all respects.

In witness whereof I have executed this Declaration of Confirmation, this 27th day of August, 1934.

Morris Lober (LS).

State of New York,
County of New York, ss.:

On this 27th day of August, 1934, before me personally came Morris Lober, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Emanuel Hardbrod, Notary Public, Kings County, Kings County Clerk's No. 469, New York County Clerk's No. 303, Commission expires Mar. 30, 1935.

[fol. 12] EXHIBIT B TO PETITION

Know all men by these presents that I, Morris Lober, of the Borough of Manhattan, City, County and State of New York, hereinafter called the "Donor", for and in consideration of the sum of One Dollar lawful money of the United States to me in hand paid, receipt whereof is hereby acknowledged, and other good and valuable consideration, do hereby sell, assign, transfer and deliver unto myself, as Trustee, for my son, James Morris Lober upon the terms, conditions and trusts hereinafter set forth, the property securities and/or assets set forth in the schedule hereunto annexed, to have and to hold the same and any other property of any kind which the said Trustee may, pursuant to any of the provisions hereof, at any time hereafter receive, hold or acquire (all of which property is hereinafter referred to collectively as the "Trust Estate") in trust, nevertheless, to hold, invest and reinvest the same and to collect and receive the income thereof during the life of said James Morris Lober, or until he shall have reached the age of twenty-five years, the net income so collected shall at no time be expended either in whole or in part for the maintenance and support of said James Morris Lober during his minority, but that the donor shall continue to discharge his obligations to his minor son from his own personal funds. The Trustee may in his judgment either accumulate or reinvest the income, if any, the balance to be paid over to said James Morris Lober upon his reaching majority, the principal of said Trust Estate or the remaining portion thereof to be paid over to the said James Morris Lober when he shall have reached the age of twenty-five years.

The Trustee in his discretion may make payments to said James Morris Lober from the principal of the Trust Estate, and the amount and time of such payments shall rest in the [fol. 13] discretion of the Trustee and any and all of the sums so paid shall be entirely freed from the trust created hereby and shall be the absolute property of the payee.

The Trustee shall continue any investment which may come into his hands or from time to time invest or reinvest the same in such securities or investments as to him may seem proper, whether legal investments for trustees or

otherwise. The Trustee, for the purpose of making purchases for the account of the Trust Estate and/or for the exercise of any rights or options as hereinafter provided, may borrow money and deposit the Trust Estate in whole or in part as collateral therefor, and pay the interest required to be paid upon such loans, and in the purchase and sale of stocks, bonds, notes or other securities for the account of the Trust Estate, he may enter into any agreement in connection therewith with any person, firm, bank or corporation, as may be usual and customary in the premises. The Trustee may also sell any or all of the property of the Trust Estate after the termination of the trust created hereby, to facilitate distribution. The Trustee may consent to the reorganization, consolidation, merger or readjustment of any corporation or to the sale to any other corporation or person, of the property of any corporation of which the stocks, bonds, notes or other securities are held by the Trustee hereunder and may do any act with reference to such stocks, bonds, notes or other securities necessary or proper to enable the Trustee to obtain the benefit of such reorganization, consolidation, merger, readjustment or sale, and may hold as part of the Trust Estate any securities or other property which the Trustee may acquire as a result of such reorganization, consolidation, merger, readjustment or sale.

The Trustee further may, in his discretion, exercise any rights or options appertaining or applicable to or granted in connection with any of the stocks, bonds, notes or other securities held in the Trust Estate, and may do all acts necessary for the exercise of the same and to take advantage thereof.

[fol. 14] Whenever any corporation shall declare and pay stock dividends with respect to any of the stock held in the Trust Estate, such stock dividends in any one year, not in excess of six per cent (6%) of the number of shares of such stock so held in such Trust Estate, shall be treated as income and payable to the beneficiary of the life estate, and any excess shall be treated as principal and added to the principal of the Trust Estate.

The Donor expressly reserves to himself the right to appoint a co-trustee or trustees, or successor trustee or trus-

tees, with limitation as to their powers of investment or otherwise, as he may deem proper, provided such appointment be made in writing and duly acknowledged by him.

In case of the Donor's death before said James Morris Lober shall have reached the age of twenty-five years, then and in that case Alma T. Lober, wife of the Donor, is hereby appointed Trustee in place and stead of the Donor with the same powers and rights as conferred hereunder upon the said Morris Lober as Trustee, including the right to appoint a co-trustee or trustees, or successor trustee or trustees, with or without limitations, as she may deem proper. This appointment however, shall be revoked in case, during her lifetime, the Donor shall by instrument in writing duly acknowledged, appoint another trustee or trustees, whether such instrument specifically revokes such appointment or not.

In case of the death of the Donor, any co-trustee, substituted trustee or trustees shall make an annual account and such accounting shall be conclusive and binding upon the beneficiary or any one claiming under him, except in case of fraud,

No Trustee shall be liable for any loss by reason of any investment made in good faith, nor for any other loss whatsoever, except such as may arise out of fraud or wilful misfeasance.

The Trustee acknowledges the receipt by him of the property shown in the schedule hereto annexed, and accepts the trust hereby created.

[fol. 15] In witness whereof, this instrument has been executed this 15 day of March 1929

Morris Lober (LS), Donor, Morris Lober, Trustee.

State of New York,
County of New York, ss.:

On this 15 day of Mar. before me personally came Morris Lober to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan R. Cahen (LS), Notary Public N. Y. Co.
No. 7, 3/30/29.

[fol. 16] Schedule of Property, Securities and/or Assets March 15, 1929

Cash	$1325.50
25 National Park Bank bought @ 902	22575.00

[fol. 17] Declaration of Confirmation

Know all men by these presents that I, Morris Lober, did on or about the 15th day of March, 1929, enter into a Trust Agreement with myself as Trustee, for the benefit of my son James Morris Lober, which said Trust was intended by me to be irrevocable, and accordingly I do hereby declare and confirm that said Trust Agreement was at the time of its execution and now is and shall continue to be irrevocable in all respects.

In witness whereof I have executed this Declaration of Confirmation, this 27th day of August, 1934.

Morris Lober (LS).

State of New York,
County of New York, ss.:

On this 27th day of August 1934, before me personally came Morris Lober, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Emanuel Hardbrod, Notary Public, Kings County, Kings County Clerk's No. 469, New York County Clerk's No. 303, Commission expires Mar. 30, 1935.

[fol. 18] Exhibit C to Petition

Know all men by these presents that I, Morris Lober, of the Borough of Manhattan, City, County and State of New York, hereinafter called the "Donor", for and in consideration of the sum of One Dollar lawful money of the United States to me in hand paid, receipt whereof is hereby acknowledged, and other good and valuable consideration-, do hereby sell, assign, transfer and deliver unto myself, as Trustee, for my daughter, Maxine Lober upon the terms, conditions and trusts hereinafter set forth, the

property securities and/or assets set forth in the schedule hereunto annexed, to have and to hold the same and any other property of any kind which the said Trustee may, pursuant to any of the provisions hereof, at any time hereafter receive, hold or acquire (all of which property is hereinafter referred to collectively as the "Trust Estate") in trust, nevertheless, to hold, invest and reinvest the same and to collect and receive the income thereof during the life of said Maxine Lober, or until she shall have reached the age of twenty-five years, the net income so collected shall at no time be expended either in whole or in part for the maintenance and support of said Maxine Lober during her minority, but that the donor shall continue to discharge his obligations to his minor daughter from his own personal funds. The Trustee may in his judgment either accumulate or reinvest the income, if any, the balance to be paid over to said Maxine Lober upon her reaching her majority, the principal of said Trust Estate or the remaining portion thereof to be paid over to the said Maxine Lober when she shall have reached the age of twenty-five years.

The Trustee in his discretion may make payments to said Maxine Lober from the principal of the Trust Estate, and [fol. 19] the amount and time of such payment shall rest in the discretion of the Trustee and any and all of the sums so paid shall be entirely freed from the trust created hereby and shall be the absolute property of the payee.

The Trustee shall continue any investment which may come into his hands or from time to time invest or reinvest the same in such securities or investments as to him may seem proper, whether legal investments for trustees or otherwise. The Trustee, for the purpose of making purchases for the account of the Trust Estate and/or for the exercise of any rights or options as hereinafter provided, may borrow money and deposit the Trust Estate in whole or in part as collateral therefor, and pay the interest required to be paid upon such loans, and in the purchase and sale of stocks, bonds, notes or other securities for the account of the Trust Estate, he may enter into any agreement in connection therewith with any person, firm, bank or corporation, as may be usual and customary in the premises. The Trustee may also sell any or all of the

property of the Trust Estate after the termination of the trust created hereby, to facilitate distribution. The Trustee may consent to the reorganization, consolidation, merger or readjustment of any corporation or to the sale to any other corporation or person, of the property of any corporation of which the stocks, bonds, notes or other securities are held by the Trustee hereunder and may do any act with reference to such stocks, bonds, notes or other securities necessary or proper to enable the Trustee to obtain the benefit of such reorganization, consolidation, merger, readjustment or sale, and may hold as part of the Trust Estate any securities or other property which the Trustee may acquire as a result of such reorganization, consolidation, merger, readjustment or sale.

The Trustee further may, in his discretion, exercise any rights or options appertaining or applicable to or granted in connection with any of the stocks, bonds, notes or other securities held in the Trust Estate, and may do all acts necessary for the exercise of the same and to take advantage thereof.

[fol. 20] Whenever any corporation shall declare any pay stock dividends with respect to any of the stock held in the Trust Estate, such stock dividends in any one year, not in excess of six per cent (6%) of the number of shares of such stock so held in such Trust Estate, shall be treated as income and payable to the beneficiary of the life estate, and any excess shall be treated as principal and added to the principal of the Trust Estate.

The Donor expressly reserves to himself the right to appoint a co-trustee or trustees, or successor trustee or trustees, with limitations as to their powers of investment or otherwise, as he may deem proper, provided such appointment be made in writing and duly acknowledged by him.

In case of the Donor's death before said Maxine Lober shall have reached the age of twenty-five years, then and in that case Alma T. Lober, wife of the Donor, is hereby appointed Trustee in place and stead of the Donor with the same powers and rights as conferred hereunder upon the said Morris Lober as Trustee, including the right to appoint a co-trustee or trustees, or successor trustee or trustees, with or without limitations, as she may deem proper.

This appointment however, shall be revoked in case, during her lifetime, the Donor shall by instrument in writing duly acknowledged, appoint another trustee or trustees, whether such instrument specifically revokes such appointment or not.

In case of the death of the Donor, any co-trustee, substituted trustee or trustees shall make an annual account and such accounting shall be conclusive and binding upon the beneficiary or any one claiming under him, except in case of fraud.

No Trustee shall be liable for any loss by reason of any investment made in good faith, nor for any other loss whatsoever, except such as may arise out of fraud or wilful misfeasance.

The Trustee acknowledges the receipt by him of the property shown in the schedule hereto annexed, and accepts the trust hereby created.

[fol. 21] In witness whereof, this instrument has been executed this 18 day of March 1929

Morris Lober (LS), Donor, Morris Lober, Trustee.

State of New York,
County of New York, ss.:

On this 18th day of Mar. before me personally came Morris Lober to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan R. Cahen (LS), Notary Public N. Y. Co. No. 7, 3/30/29.

[fol. 22] Schedule of Property, Securities and/or Assets March 18th, 1929

Bought 50 Public Natl. Bank @ 267	$13,350.00
March 27th, 1929	
Cash	2,709.00

[fol. 23] Declaration of Confirmation

Know all men by these presents that I, Morris Lober, did on or about the 18th day of March, 1929, enter into a

Trust Agreement with myself as Trustee, for the benefit of my daughter Maxine Lober, which said Trust was intended by me to be irrevocable, and accordingly I do hereby declare and confirm that said Trust Agreement was at the time of its execution and now is and shall continue to be irrevocable in all respects.

In witness whereof I have executed this Declaration of Confirmation, this 27th day of August 1934.

Morris Lober (LS).

State of New York,
County of New York, ss.:

On this 27th day of August 1934, before me personally came Morris Lober, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Emanuel Hardbrod, Notary Public, Kings County, Kings County Clerk's No. 469, New York County Clerk's No. 303, Commission expires Mar. 30, 1935.

[fol. 24] Exhibit D to Petition

I, Morris Lober, of the County of Westchester, State of New York, do hereby make, publish and declare this to be my last will and testament, hereby revoking all other wills and codicils thereto by me at any time heretofore made.

First: I give and bequeath all my jewelry, silverware, plated ware, china, ornaments, bric-a-brac, books, pictures, paintings, engravings, household furniture, automobiles, clothing and other chattels to my wife Alma T. Lober.

If my wife does not survive me, I give and bequeath such part of the chattels hereinabove mentioned as my executors shall deem meet and proper to my children, to be distributed among them in such shares and proportions as my executors shall deem just, and the residue thereof shall fall into and become part of my residuary estate.

Second: I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of every kind, nature and description whatsoever, and where-

soever situate, to my trustees hereinafter named, to have and to hold the same to them and to their survivor and to their successors for the uses and purposes next hereinafter set forth:

a. To divide the same into as many equal shares as I may leave children me surviving and children that shall have died before me leaving issue me surviving, plus one additional share for my wife if she survives me.

b. To invest and reinvest the principal of each share, and to collect the income and to pay therefrom all the expenses of the management thereof that may lawfully be charged against income.

c. To set apart one such share for my wife and to pay the net income thereof to her during the term of her natural life or as long as she remains my widow, and upon the death [fol. 25] or remarriage of my wife, whichever event shall first occur (hereinafter called "the event of termination"), to divide the principal thereof into as many sub-shares as I leave children living at the event of termination and children that shall have died before the event of termination leaving descendants surviving the event of termination, and to add one such sub-share to each share then held in trust for the benefit of one of my surviving children upon the terms and conditions next hereinafter set forth, and to pay over and divide one such sub-share in equal parts *per stirpes* to and among the then surviving descendants of each child that shall have died before the event of termination leaving descendants surviving the event of termination.

d. To set apart for each child of mine me surviving one of the shares mentioned and described in sub-paragraph a. of this Second paragraph of my will, and until the child for whom such share is set apart attains the age of twenty-five years to pay the net income thereof to my wife for her own use during her widowhood. In the event that my wife dies or remarries before such child attains the age of twenty-five years then from such death or remarriage, whichever event shall first occur, to apply the net income of such share, or such part thereof as my trustees may deem suitable, to the support and education of such child during minority, and to accumulate the balance of

such net income and to pay the same to such child at majority, and after such child attains majority to pay the net income to such child in quarterly instalments during the term of his natural life. After such child attains the age of twenty-five years, I direct my trustees, whether or not my wife is then living, and whether or not she is then my widow, to pay the net income of such share to such child in quarterly instalments during the term of his natural life, and upon his death to pay over and distribute the principal of such share to and among such persons and corporations, and in such manner and in such shares and proportions as such child may by last will and testament designate and appoint, and failing a valid and entire exer- [fol. 26] cise of such power of appointment I give, devise and bequeath the principal of such share to the issue of such child him surviving, and failing issue of such child him surviving I give, devise and bequeath the same to my issue such child surviving.

e. I give, devise and bequeath one of the shares mentioned and described in sub-paragraph a. of this Second paragraph of my will to the issue of each child of mine that shall have died before me leaving issue me surviving.

f. I direct my trustees, anything herein to the contrary notwithstanding, at any time or from time to time after any son of mine shall have attained the age of thirty years, to pay over to such son out of the principal of his share of my residuary estate such sum or sums, not exceeding the aggregate one-fourth of the then value of the principal of such share, as my wife, whether or not she is then my widow, may from time to time in writing direct, and upon the death of my wife I direct my trustees forthwith to pay over to such son, if such son has then attained the age of thirty years (and if such son has not then attained the age of thirty years then upon his attaining the age of thirty years) out of the principal of his share of my residuary estate (as increased pursuant to sub-paragraph e. by the addition of a portion of the share originally set apart for my wife) a sum equal to the amount, if any, by which the moneys previously advanced to such son as hereinabove provided fall short of one-fourth of the total principal of such share as so increased, calculating the advances previously made at the value thereof as of the

dates of the respective advances and calculating the remaining principal at the value thereof at the time of such final advancement. The judgment of my trustees as to the value of the principal of such son's share of my residuary estate shall at all times be conclusive upon all persons interested in my estate.

Third: I direct that if when any part of the principal of my estate becomes payable to any benficiary hereunder [fol. 27] such beneficiary is an infant, the principal shall vest in such infant, but payment thereof shall be deferred, and I direct my executors or trustees to hold the share of such infant and to apply (or in their discretion to pay to the person with whom such infant resides or sojourns) such part of the income and principal thereof as in their discretion they may deem necessary and proper to the support and education of such infant, and when such infant attains majority to pay over to him whatever part of such principal and any accumulated income thereof may then remain in their hands.

Fourth: All of the foregoing legacies, devises, trust funds, beneficial interests, remainders and other gifts are given free of all estate, inheritance, succession and transfer taxes, and to that end I direct my executors to pay all such taxes out of and charge the same against the principal of my residuary estate.

Fifth: My failure to make any provision for my brothers and sisters is not due to any lack of affection on my part, but is due solely to the consideration that I have in other ways already made ample provision for them.

Sixth: If my wife does not survive me, I nominate and appoint my mother-in-law Hermine E. Toch and my sister-in-law Maxine Lambert, and the survivor of them, to be the guardians of the persons and estates of my minor children. In the event that either of said guardians by reason of death, resignation, or any other cause fails or at any time during the minority of any child ceases to act as guardian, then I nominate and appoint my sister Minerva Caine to act as guardian in the place and stead of the one so ceasing or failing to act. In the event that my wife should remarry or die during the minority of any child, I authorize my trustees during the minority of such child to

pay over to my wife or to the guardians of the person of such child, or to the survivor of them, such part of the income of the share of such child as my trustees may deem suitable for his support and education, and I direct that [fol. 28] the receipt of my wife or of such guardians of the person or of their survivor shall discharge my trustees from any further liability on account of such income, and I further direct that neither my wife nor such guardians of the person shall ever be called upon to account in detail for the expenditure of such income, and that they shall in no event be required to give security for the performance of their trust hereunder.

Seventh: I authorize and direct my executors and trustees to permit any moneys or securities, credits or interest that I may at the time of my death have with or in the partnership of Lober Brothers & Co. (or with or in any other New York Stock Exchange partnership of which my brother Louis or my brother Charles may then be a member) to remain on deposit with such partnership until the same can be paid or delivered to my executors without embarrassment or inconvenience to said partnership, provided that my brother Louis or my brother Charles remains a member of said partnership, and provided further that such payment or delivery shall in no event be postponed beyond one year after my death. The interest or other compensation, if any, to be paid to my estate by such partnership shall rest in the absolute discretion of my brothers Louis and Charles or such one of them as shall be a member of such partnership. I direct that any written statement relative to the status of my account with said partnership rendered to my executors or trustees and signed by my brothers Louis and Charles Lober or by such one of them as is then a member of such partnership shall be binding and conclusive upon my said executors and trustees and upon all persons interested in my estate.

Eighth: In the event that my wife Alma T. Lober should express a desire to become a limited partner in the partnership of Lober Brothers & Co., or in any other New York Stock Exchange partnership of which I may be a member at the time of my death, I authorize and direct my executors and trustees (provided that my brother Louis [fol. 29] or my brother Charles or one of my sons is then

a member of such partnership) to lend my wife, upon her note, whatever sum (up to but not exceeding two hundred thousand dollars ($200,000.)) she may request for the purpose of enabling her to use such money as her contribution to the capital of such limited partnership. Such note shall be made at such rate of interest, or without any interest, as my wife in her uncontrolled discretion may determine. Such note shall run for a period of time co-extensive with the term of such limited partnership. I direct my executors to renew the note from time to time as the term of the limited partnership is extended. Such note need not be secured by any collateral other than an assignment by my wife to my executors and trustees of her right to receive repayment of her contribution to the capital of the limited partnership in accordance with the terms of the partnership agreement. In the event that my wife cannot or for any reason does not become a limited partner in the New York Stock Exchange partnership of which I may be a member at the time of my death, I authorize and empower my executors or trustees at the written request of my wife to lend to my brother Louis and my brother Charles or to such one of them as is then a member of such partnership, whatever sums up to but not exceeding two hundred thousand dollars ($200,000.) my wife may request, upon their or his unsecured notes bearing interest at such rate as my wife in her absolute discretion may direct. Such notes shall run for such period of time as my executors or trustees deem advisable and may be extended from time to time provided that the note shall by its terms become due and payable at any time that neither my brother Louis or my brother Charles continues to be a member of such partnership.

Ninth: I authorize my executors and trustees to retain any investments, real or personal, of which I may die possessed, or to sell and dispose of the same, and I authorize [fol. 30] my said trustees to invest and reinvest the principal of the trust funds in and by this will created, and all lawful accumulations of the income thereof, in such securities as may be permitted for the investment of trust funds by the laws and statutes of the State of New York, except that my trustees shall not make any investments in real estate mortgages made to secure the bonds of any

real estate corporation or of any individual, and provided further that except as to direct obligations of the United States of America, or obligations guaranteed as to principal and interest by the United States of America, not more than five per cent (5%) of the total amount of the trust funds shall at any one time be invested in the securities of any one state, county, municipality or district, or of any one corporation.

Tenth: I authorize and empower my executors or trustees to consent to the reorganization, consolidation, or merger of any corporation of which they may at any time hold shares of stock, bonds, notes or other obligations, or to the sale or lease of all the property of such corporation, or any part thereof, and upon such reorganization, consolidation, merger, sale or lease, to exchange the securities held by said executors or trustees for the securities issued in connection therewith, and to pay any or all assessments imposed in the course of such reorganization, consolidation or merger in respect to the securities so held by my executors or trustees, and to subscribe and pay for any securities that may be issued in connection with such reorganization, consolidation or merger, and to do any and all acts that may be necessary or desirable to effectuate such reorganization, consolidation, merger, sale or lease. I authorize and empower my executors or trustees in their discretion to exercise in respect of all shares of stock, bonds, notes, or other investments held by them, all rights, powers and privileges that may lawfully be exercised by any person owning similar property in his own right.

Eleventh: I direct my trustees not to accumulate a sinking fund to amortize or offset the amount by which the [fol. 31] cost or value of any bond, note or other redeemable security exceeds the face value or the redemption price thereof, and I expressly direct that my trustees distribute as income all the interest and dividends received on such securities.

Twelfth: I authorize my trustees to determine in their absolute discretion whether any stock dividends received by them are to be considered principal or income, unless a corporation declares stock dividends in excess of ten per cent (10%) in any calendar year, in which event all of the stock dividends declared by such corporation in that year

in excess of ten per cent (10%) must be considered principal.

Thirteenth: I authorize my trustees to carry the record title of any real estate or personal property constituting a part of any trust in the name of any nominee or nominees selected by them.

Fourteenth: I nominate and appoint my wife Alma T. Lober and my brothers Max Lober, Louis Lober and Charles Lober to be executors of this my last will and testament.

I nominate and appoint my wife Alma T. Lober and my brother Louis Lober to be trustees of the trusts herein created, and I direct them to appoint either the United State Trust Company of New York or The Chase National Bank of the City of New York to act with them as such trustees. I authorize and direct my trustees or the survivor of them from time to time as each child of mine attains the age of twenty-five years to appoint such child as an additional trustee to act with them or it as trustee of the trusts herein created. In the event that any of said trustees should fail to qualify or cease to act before my oldest child then living has attained the age of twenty-five years, I authorize and direct my surviving trustees to appoint my brother Charles Lober to act with them as trustee of the trusts herein created, and in the event that my said brother or a second one of my two trustees first above-named should fail to qualify or cease to act before my [fol. 32] oldest child then living has attained the age of twenty-five years, I authorize and direct my remaining trustees to appoint my brother Max Lober to act with them as trustees of the trusts herein created. The appointment aforesaid shall be made by instruments in writing duly acknowledged as deeds entitled to be recorded, and each trustee appointed as aforesaid shall thenceforth be competent in all things to act in the execution of the trusts herein created as fully and effectually with all the powers and authorities, both imperative and discretionary, which are herein conferred upon my original trustees.

I empower any of my trustees to delegate to his associate trustees or trustee any and all the powers, either imperative or discretionary, herein given to him and to make such

delegation by power of attorney duly acknowledged as a deed entitled to be recorded.

I direct that none of the executors or trustees herein mentioned shall in any event be called upon to give security for the performance of his duties hereunder.

In witness whereof, I have hereunto set my hand and affixed my seal this 24th day of November in the year one thousand nine hundred and thirty-six.

Morris Lober.

The foregoing instrument, consisting of 11 pages, each page bearing the signature of the Testator, was signed, subscribed, sealed, published and declared by said Testator as and for his last will and testament, in the presence of us and of each of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses the day and year last above written.

Manfred W. Ehrich residing at Long Ridge, Stamford, Conn.

Nathan R. Caine residing at 23 West 73rd Street, N. Y. City.

[fols. 33-34] General Traverse—Filed September 15, 1949

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

/s/ Theron Lamar Caudle, Assistant Attorney General.

EBD

[fol. 35] In United States Court of Claims

[Title omitted]

Stipulation of Facts—Filed April 11, 1952

It is hereby stipulated by and between the undersigned attorneys for the respective parties hereto that the following facts may be considered as true for the purposes of

this action and that the exhibits annexed hereto shall be received in evidence subject to the right of either party to introduce further evidence not inconsistent therewith.

1. This claim is founded upon the laws of the United States relating to internal revenue, particularly Sections 810, 811(c), (d) of the Internal Revenue Code.

2. The jurisdiction of the court is based on Chapter 91 of the Judicial Code (28 U. S. C. A. Section 1491). This suit is filed under Section 1491 of title 28 of the United States Code entitled Judicial Code and Judiciary and Sections 3313, 3770, 3771 and 3772 of title 26 of the United States Code entitled Internal Revenue Code.

[fol. 36] 3. Morris Lober, the decedent above named, died a resident of the County of Westchester, State of New York, on the 13th day of December, 1942.

4. The will of said decedent, dated and executed November 24, 1936, a true copy of which is attached to the petition herein as Exhibit D thereto, was duly admitted to probate and letters testamentary thereunder were duly issued by the Surrogate's Court of Westchester County of New York on the 6th day of February, 1943 to Louis Lober, Charles Lober, Alma T. Lober and Max Lober.

5. Louis Lober, Charles Lober, Alma T. Lober and Max Lober acted as executors of the will of said decedent from the 6th day of February, 1943 to the 7th day of October, 1946. Max Lober died on the 7th day of October, 1946. Since the death of said Max Lober the petitioners herein, namely, Louis Lober, Charles Lober and Alma T. Lober have continued to act and are now acting as surviving executors of said will.

6. Said decedent on October 31, 1924, by instrument in writing, created a trust for the benefit of his son, Robert T. Lober, consisting of cash in the amount of $742.02 and 75 shares of stock of Importers and Exporters Insurance Company, a true copy of which instrument is annexed to the petition herein as Exhibit A thereto.

7. Said decedent on March 15, 1929, by instrument in writing, created a separate trust for the benefit of his son, James Morris Lober, consisting of cash in the amount of $1,325.50 and 25 shares of stock of National Park Bank,

a true copy of which instrument is annexed to the petition herein as Exhibit B thereto.

8. Said decedent on March 18, 1929, by instrument in writing, created a separate trust for the benefit of his [fol. 37] daughter, Maxine Lober, consisting of 50 shares of stock of Public National Bank transferred on or about March 18, 1929 and cash transferred on or about March 27, 1929 in the amount of $2,709.00, a true copy of which instrument is annexed to the petition herein as Exhibit C thereto.

9. On August 27, 1934, said decedent executed three separate instruments in identical form separately confirming the fact that each of said trusts referred to in paragraphs 6, 7 and 8 hereof had been duly constituted and had been and was irrevocable, true copies of which three instruments are annexed to the petition herein immediately after Exhibits A, B and C thereto.

10. Robert T. Lober, at the time of the creation of the trust for his benefit was the only child of the decedent, Morris Lober. James Morris Lober and Maxine Lober and said Robert T. Lober constituted all the children of the decedent, Morris Lober, at the time of the creation of the trusts for the benefit of James Morris Lober and Maxine Lober. Said three persons at all times subsequent to the creation of said trusts were the only children of the decedent, Morris Lober and said three persons all survived said decedent.

11. None of said trusts referred to in pargraphs 6, 7 and 8 hereof was created by the decedent in contemplation of death.

12. On March 14, 1944, Louis Lober, as executor of the Estate of Morris Lober, deceased, paid to the Collector of Internal Revenue at Albany, New York, the amount of $93,642.56 in payment of the estate tax liability on this estate as shown in the estate tax return.

13. By letter dated June 7, 1946, the Internal Revenue Agent in Charge of the Upper New York Division notified the executors of a proposed adjustment to the estate [fol. 38] tax liability of this estate. One of such adjustments was the inclusion in the estate of the decedent of the assets of said three trusts created by the decedent, Morris

Lober, for his children. The assets of said three trusts were valued by the Internal Revenue Agent as of December 13, 1942 at $128,139.67.

14. On January 17, 1947, plaintiff, Louis Lober as executor of the will of said decedent, signed a waiver of restrictions and consent to assessment and collection of estate tax on said estate in the sum of $109,917.47 with interest (which resulted from the inclusion of said trust assets and also from other changes in the estate tax schedules as filed) but reserved the right to file a claim for refund on the issue of the propriety of including the assets of said three trusts.

15. On February 20, 1947, plaintiffs, as such executors, paid to the Collector of Internal Revenue at Albany, New York, the sum of $129,261.44, representing the deficiency of $109,917.47, with interest of $19,343.97. A further deficiency was assessed in March 1947 in the amount of $12,166.62, representing the balance of the tentative credit for state estate taxes taken into consideration in arriving at the above-mentioned deficiency, together with interest of $2,183.16. No part of this additional deficiency has been paid by the plaintiffs to the United States or any officer or agency thereof.

16. On April 23, 1947, plaintiff, Louis Lober, as executor of the will of said decedent, duly filed a claim for refund on Form 843 requesting refund of estate tax in the amount of $39,012.19 assessed and collected as aforesaid and interest claimed and collected thereon up to February 19, 1947 in the amount of $6,865.62 or a total of $45,877.81. On or about and under date of September 2, 1947, the Commissioner of Internal Revenue rejected said claim for refund in its entirety.

[fols. 39-40] 17. No part of the payment of $129,261.44 paid on February 20, 1947, as set forth in paragraph 15 hereof, has been refunded to the plaintiffs.

18. If the plaintiffs herein are held entitled to any refund of estate taxes, it is further agreed by the parties that such amount shall be adjusted by credit for state estate and inheritance taxes if plaintiffs establish the payment for

credit thereof in accordance with Section 813(b) of the Internal Revenue Code.

James G. Holland, Attorney for Plaintiffs. Ellis N. Slack, Acting Assistant Attorney General.

Elizabeth B. Davis, Attorney.

[fols. 41-42] On motion made therefor and allowed by the Court, plaintiffs filed their first amendment to petition, which is as follows:

IN UNITED STATES COURT OF CLAIMS

[Title omitted]

FIRST AMENDMENT TO PETITION—Filed May 1, 1952

Paragraph designated "8" of the Petition herein is amended to read as follows:

"8. That, under the laws of the State of New York, each of said trusts was complete and irrevocable at the time it was established, as set forth in paragraphs 4, 5 and 6 of this petition, and the principal of said trusts were vested respectively in said Robert T. Lober, James Morris Lober and Maxine Lober."

James G. Holland, Attorney for Plaintiffs, Office & Post Office Address, No. 20 Exchange Place, Borough of Manhattan, New York 5, New York.

[fols. 43-44] IN UNITED STATES COURT OF CLAIMS

PROCEEDINGS FOLLOWING FILING OF AMENDMENT TO PETITION

On April 16, 1952, Defendant filed a motion to have General Traverse applied to amended petition.

On May 7, 1952, the Court allowed said motion.

IN UNITED STATES COURT OF CLAIMS

ARGUMENT AND SUBMISSION OF CASE

On November 5, 1952, the case was argued and submitted on merits by Mr. David Stock for plaintiff, and by Mrs. Elizabeth B. Davis for defendant.

[fol. 45] IN UNITED STATES COURT OF CLAIMS

Mr. David Stock for the plaintiffs. Ehrich, Stock, Leighton & Holland were on the brief.

Mrs. Elizabeth B. Davis, with whom was Mr. Assistant Attorney General Charles S. Lyon, for the defendant. Mr. Andrew D. Sharpe, Special Assistant to the Attorney General, was on the brief.

OPINION—Filed December 2, 1952

MADDEN, Judge, delivered the opinion of the court:

This is a suit by the executors of Morris Lober to recover certain estate taxes which the Government collected from the estate. They claim that the taxes were computed upon assets which were not properly includible in the estate, for tax purposes. The assets in question were the subject matter of separate trusts, created by Morris Lober in 1924, for his son Robert T. Lober, and in 1929 for his son James Morris Lober and for his daughter, Maxine Lober. These beneficiaries were in early childhood when the trusts were created. Morris Lober did not die until 1942.

Each of the trusts provided that the principal of the trust should be paid over to the beneficiary when he reached the age of twenty-five. Morris Lober, who was himself the trustee of each trust, had the power, according to the trust instrument, in his discretion to accumulate any part of the income until the beneficiary came of age. Either before or after the beneficiary reached majority, the trustee could, in his discretion, pay over a part or all of the principal to the beneficiary. The trust instruments made no provision for a gift over to any one else, in case a beneficiary died before reaching twenty-five, and had not, be-

[fol. 46] fore his death, received the principal of his fund.

Our question is whether the powers which Morris Lober retained over the assets which he placed in these trusts, the power to accumulate income during the benficiaries' minority and the power to, in effect, terminate the trust in part or in whole by paying over a part or all of the principal to the beneficiary before he reached the age of twenty-five, were such elements of control as kept the assets within Morris Lober's estate, for estate tax purposes. Another question will be posed and commented on herein after.

Section 811 (d) (2) of the Internal Revenue Code provided that there should be included, for estate tax purposes, in the gross estate of a decedent, any property which the decedent had transferred in trust, where the enjoyment of the property was, at the date of the decedent's death, subject to the decedent's power to alter, amend, or revoke the trust. The Supreme Court held, in *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, that the termination of a trust was covered by the words "alter, amend, or revoke." The Government urges that the decedent here had the power to terminate the trusts by paying over the trust assets to the beneficiaries at any time before they would have had to be so paid over under the terms of the trust instruments, and that therefore the assets were covered by Section 811 (d) (2) as interpreted in the *Holmes* case.

The plaintiffs distinguish the *Holmes* case, *supra*, upon the ground that there the trust instrument provided for a gift over to other persons if a primary beneficiary should not survive the fifteen year period of the trust, and had not received the principal before his death. The gifts over were to the benficiary's children, if any survived him; if none, to the beneficiary's brothers or their surviving children per stirpes; if none to the settlor's widow, if living; if not to her heirs. In the *Holmes* case, then, the settlor trustee could, by terminating the trust by the payment over of the principal before the required date, cut off the potential interests of various persons who might have received the property if it had been kept in trust and the beneficiary had died before the time when payment of the principal was mandatory.

The plaintiffs urge that in the instant case the settlor could, by the premature payment over of the principal, only cut off the chance of the heirs of the beneficiary to

[fol. 47] enjoy the property, as they would have done if the property had been kept in the trust and the beneficiary had died before reaching the age of twenty-five. We assume, for present purposes that this is true; that the beneficiary had an inheritable interest in the trust *res* so that the right to receive the principal would have passed to his estate, rather than returning to the settlor, which would seem to be the only other possible disposition of it.

In *Commissioner* v. *Holmes*, *supra*, the Supreme Court said:

> It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which § 811 (d) (2) requires in order to avoid the tax.

This reasoning seems to us to be conclusive of the instant case. The power of the settlor to pay over the principal was, in truth, the power to determine whether the beneficiary should, or should not, have the enjoyment of the property. As the Supreme Court said, it was not a mere question of acceleration of payment, of whether he should enjoy the property sooner or later, but whether he should enjoy it at all, or not. The identification of a living person with his heirs, as in the Rule in Shelley's Case, or the doctrine of worthier title, has no doubt served some purpose in our land law. But for the practical purpose of determining whether the creator of a trust has retained enough of the incidents of ownership or control to make

it probable that Congress intended to tax the trust *res* as a part of his estate, such an identification lacks reality. A father who has the power to decide that his son should have certain assets to use, enjoy, spend, waste or invest, [fol. 48] or to decide that he shall not have them at all for any of these purposes, but that his creditors, his children, wife, or collateral relatives should have them, has a significant control over the assets. We think it is substantially the kind of control which the Supreme Court was dealing with in *Commissioner* v. *Holmes*.

We have reached the above conclusion upon the assumption that the beneficiaries had vested interests which would have descended to their heirs had they died before reaching the age of twenty-five. The Government urges that they did not have vested interests, and that the assets would in that case have reverted to the settlor by reason of the failure of the trust. If the Government is right, the trust property was clearly includible in the taxable estate of the settlor. The question is, of course, a question of New York law, and we are uncertain of the answer. Since we have decided the case on another ground, it is not necessary for us to answer the question.

The case of *Hays' Estate* v. *Commissioner*, 181 Fed. 2d 169, involved substantially the same question as the instant case and the United States Court of Appeals for the Fifth Circuit decided that the assets were not includible in the decedent's taxable estate. We regret that we are unable to agree with that decision.

The plaintiffs' petition will be dismissed.

It is so ordered.

Howell, Judge; Whitaker, Judge; and Littleton, Judge; concur.

Jones, Chief Judge, dissenting in part:

I would not decide this case on the basis stated in the majority opinion. I do not believe the settlor retained the substantial control contemplated by the statute.

If under the New York law, in the event of the death of a beneficiary, the property would revert to the settlor rather than be distributed to the heirs of the deceased bene-

ficiary, the petition should be dismissed; otherwise plaintiff should be allowed to recover.

Finding of Fact

The court makes findings of fact based upon the facts as stipulated by the parties, the briefs and argument of counsel, as follows:

[fol. 49] 1. Morris Lober, the decedent, died a resident of the County of Westchester, State of New York, on the 13th day of December, 1942.

2. The will of the decedent, dated and executed November 24, 1936, a true copy of which is attached to the petition herein as Exhibit D thereto, was duly admitted to probate and letters testamentary thereunder were duly issued by the Surrogate's Court of Westchester County, New York, on the 6th day of February, 1943, to Louis Lober, Charles Lober, Alma T. Lober and Max Lober.

3. Louis Lober, Charles Lober, Alma T. Lober and Max Lober acted as executors of the will of said decedent from the 6th day of February 1943 to the 7th day of October 1946. Max Lober died on the 7th day of October 1946. Since the death of said Max Lober the petitioners herein, namely, Louis Lober, Charles Lober and Alma T. Lober have continued to act and are now acting as surviving executors of said will.

4. Decedent on October 31, 1924, by instrument in writing, created a trust for the benefit of his son, Robert T. Lober, consisting of cash in the amount of $742.02 and 75 shares of stock of Importers and Exporters Insurance Company, a true copy of which instrument is annexed to the petition herein as Exhibit A thereto.

5. Decedent on March 15, 1929, by instrument in writing, created a separate trust for the benefit of his son, James Morris Lober, consisting of cash in the amount of $1,325.50 and 25 shares of stock of National Park Bank, a true copy of which instrument is annexed to the petition herein as Exhibit B thereto.

6. Decedent on March 18, 1929, by instrument in writing, created a separate trust for the benefit of his daughter, Maxine Lober, consisting of 50 shares of stock of Public National Bank transferred on or about March 18, 1929, and

cash transferred on or about March 27, 1929, in the amount of $2,709.00, a true copy of which instrument is annexed to the petition herein as Exhibit C thereto.

7. On August 27, 1934, decedent executed three separate instruments in identical form separately confirming the fact that each of said trusts referred to in paragraphs 4, 5 and 6 hereof had been duly constituted and had been [fol. 50] and was irrevocable, true copies of which three instruments are annexed to the petition herein immediately after Exhibits A, B and C thereto.

8. Robert T. Lober, at the time of the creation of the trust for his benefit was the only child of the decedent, Morris Lober. James Morris Lober and Maxine Lober and said Robert T. Lober constituted all the children of the decedent, Morris Lober, at the time of the creation of the trusts for the benefit of James Morris Lober and Maxine Lober. Said three persons at all times subsequent to the creation of said trusts were the only children of the decedent, Morris Lober and said three persons all survived decedent.

9. None of said trusts referred to in paragraphs 4, 5, and 6 hereof was created by the decedent in contemplation of death.

10. On March 14, 1944, Louis Lober, as executor of the Estate of Morris Lober, deceased, paid to the Collector of Internal Revenue at Albany, New York, the amount of $93,642.56 in payment of the estate tax liability on this estate as shown in the estate tax return.

11. By letter dated June 7, 1946, the Internal Revenue Agent in Charge of the Upper New York Division notified the executors of a proposed adjustment to the estate tax liability of this estate. One of such adjustments was the inclusion in the estate of the decedent of the assets of the three trusts created by the decedent, Morris Lober, for his children. The assets of the three trusts were valued by the Internal Revenue Agent as of December 13, 1942 at $128,139.67.

12. On January 17, 1947, plaintiff, Louis Lober as executor of the will of said decedent, signed a waiver of restrictions and consent to assessment and collection of estate tax on said estate in the sum of $109,917.47 with interest (which resulted from the inclusion of said trust assets and also

from other changes in the estate tax schedules as filed) but reserved the right to file a claim for refund on the issue of the propriety of including the assets of said three trusts.

13. On February 20, 1947, plaintiffs, as such executors, paid to the Collector of Internal Revenue at Albany, New York, the sum of $129,261.44, representing the deficiency of $109,917.47, with interest of $19,343.97. A further deficiency [fols. 51-52] was assessed in March 1947 in the amount of $12,166.62, representing the balance of the tentative credit for state estate taxes taken into consideration in arriving at the above-mentioned deficiency, together with interest of $2,183.16. No part of this additional deficiency has been paid by the plaintiffs to the United States or any officer or agency thereof.

14. On April 23, 1947, plaintiff, Louis Loher, as executor of the will of said decedent, duly filed a claim for refund on Form 843 requesting refund of estate tax in the amount of $39,012.19 assessed and collected as aforesaid and interest claimed and collected thereon up to February 19, 1947, in the amount of $6,865.62 or a total of $45,877.81. On or about and under date of September 2, 1947, the Commissioner of Internal Revenue rejected the claim for refund in its entirety.

15. No part of the payment of $129,261.44 paid on February 20, 1947, as set forth in paragraph 13 hereof, has been refunded to the plaintiffs.

16. If the plaintiffs herein are held entitled to any refund of estate taxes, the parties have agreed that such amount shall be adjusted by credit for state estate and inheritance taxes if plaintiffs establish the payment for credit thereof in accordance with Section 813 (b) of the Internal Revenue Code.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that, as a matter of law, the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

Judgment is rendered against plaintiffs for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

[fols. 53-54] In United States Court of Claims

Judgment of the Court—December 2, 1952

Upon the findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover.

It is therefore adjudged and ordered that the plaintiffs' petition be and the same is hereby dismissed.

[fols. 55-56] In United States Court of Claims

Proceedings After Entry of Judgment

On December 31, 1952, the plaintiffs filed a motion for rehearing.

On February 3, 1953, the court entered the following order on said motion:

Order

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rule 53 of the Rules of this court and, on consideration thereof,

It is ordered this third day of February, 1953, that said motions be and the same are overruled as follows:

49290 Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased. Plaintiff's motion for rehearing.

By the Court, /s/ Marvin Jones, Chief Judge.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 695

LOUIS LOBER, et al., as Executors of the Last Will and Testament of Morris Lober, Deceased, Petitioners,

vs.

THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1953

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2264)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~695~~ 30

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

DAVID STOCK,
Counsel for Petitioners

EHRICH, STOCK, LEIGHTON & HOLLAND,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 695

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Supreme Court of the United States:

Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased, by David Stock, their attorney, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States.

Summary Statement of Matter Involved

This is a tax case, involving a claim for refund of Federal estate tax. Said tax resulted from the inclusion by the United States in the taxable estate of the petitioners' decedent of the principal of certain inter-vivos trusts created by the decedent (R. 34). Under each trust instrument, the income beneficiary was to receive the principal at the age of twenty-five, with a power reserved to the decedent, as trustee, to accumulate income during said

beneficiary's minority and to accelerate the payment of the principal (R. 5, 9, 12). The Court of Claims decided that each of the trusts was subject to estate tax, on the authority of *Commissioner* v. *Holmes*, 326 U.S. 480, even though, as contended by petitioners, each of said beneficiaries had a vested interest in the income and principal that would pass to his heirs in the event of his death before the age of twenty-five (R. 30-32).

Statutes and Regulations Involved

The statutes and regulations involved may be found in the Appendix, *infra*, p. 22.

Question Presented

Where a decedent creates a trust, under which any accumulated income is to be paid to the income beneficiary at his majority and the principal is to be paid to said beneficiary at age twenty-five, and said beneficiary has a vested interest in said income and principal which would descend to his heirs if he died before receiving the same, does a reserved power, possessed by the decedent at the time of his death, to accumulate income during minority and to pay the principal to said beneficiary before he is twenty-five, bring the principal of the trust within the decedent's gross estate, for Federal estate tax purposes?

Reasons Relied On for the Allowance of the Writ

1. The decision of the Court of Claims is in conflict with the decision of the Court of Appeals for the 5th Circuit in *Hays' Estate* v. *Commissioner*, 181 F. 2d 169, as was expressly recognized by the Court of Claims in declining to agree with it (R. 32).

2. The decision of the Court of Claims is in conflict with the decision of this Court in *Commissioner* v. *Holmes*, 326 U. S. 480, in that the essential factual element upon which that decision was based is absent in the instant case.

3. The decision of the Court of Claims is in conflict with the principle in the following cases, to the effect that Section 811(d) of the Internal Revenue Code covers only powers whose termination by death constitutes a substitute for testamentary disposition.

Porter v. *Commissioner*, 288 U. S. 433;

Loughridge's Estate v. *Commissioner*, 183 F. 2d 294 (CCA 10);

Commissioner v. *Hofheimer's Estate*, 149 F. 2d 733 (CCA 2);

Hauptfuhrer's Estate v. *Commissioner*, 195 F. 2d 584 (CCA 3);

Industrial Trust Company v. *Commissioner*, 165 F. 2d 142 (CCA 1);

Zirjacks v. *Scofield*, 197 F. 2d 688 (CCA 5).

4. The decision of the Court of Claims renders uncertain the functional scope of the applicability of Section 811(d) of the Internal Revenue Code to reserved powers to terminate trusts.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari to review the decision of the Court of Claims and the judgment of that Court made thereon be granted.

LOUIS LOBER,
CHARLES LOBER and
ALMA T. LOBER,
As Executors of the Last Will and Testament of Morris Lober, Deceased,

By DAVID STOCK,
Attorney for Petitioners,
20 Exchange Place,
New York 5, New York.

EHRICH, STOCK, LEIGHTON & HOLLAND,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 695

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED,

Petitioners,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Opinion of the Court Below

The opinion of the Court of Claims (R. 29-35) is reported in 108 F. Supp. 731. The dissenting opinion of Chief Judge Jones (R. 32-33) is also reported therein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1255(1). The judgment of the Court of Claims was entered on December 2, 1952 (R. 36). A motion for rehearing was duly and seasonably filed by petitioners on December 31, 1952, which was overruled on February 3,

1953 (R. 36). The time for filing petition for writ of certiorari, under 28 U. S. C. Section 2101(c), was thereby extended until ninety days after February 3, 1953. *Morse v. United States*, 270 U. S. 151.

Statement of the Case

The facts pertaining to the question presented here, as set forth in the stipulation of facts (R. 25-30) and as found by the Court of Claims (R. 24-25), may be summarized as follows:

Morris Lober, the decedent, died a resident of the State of New York on December 13, 1942. In 1924 and 1929 he had created essentially identical trusts for each of his three children (R. 5, 9, 12). The principal of each respective trust was to be paid over to the child when he reached the age of twenty-five. The decedent, who was the trustee of each of the trusts, had the discretion to accumulate income during the minority of the child, which accumulated income was to be paid to the child upon his attaining majority. The child was the sole designated beneficiary of the income and principal, with no alternative remainderman provided in the event of his death before the age of twenty-five. The decedent, as trustee, had the power to make distributions of principal to the beneficiary, the amount and time of such distributions resting in his discretion. There was no spendthrift provision in any of the trust instruments (R. 5, 9, 12).

The United States asserted a deficiency of estate tax, the part thereof involved in this proceeding being on the ground that the principal of said trusts was includible in the taxable estate (R. 34). On February 20, 1947, the petitioners, as executors, paid said deficiency, with interest (R. 34).

On April 23, 1947, a claim for refund was duly filed in the amount of $39,012.19, with interest thereon of $6,865.62,

representing the portion of said deficiency that is involved in this proceeding, which was rejected in its entirety by the Commissioner of Internal Revenue (R. 35).

The Court of Claims held that said trusts were includible in the taxable estate, under Section 811(d)(2) of the Internal Revenue Code, on the authority of *Commissioner* v. *Holmes*, 326 U. S. 480.

Specifications of Error

The court below erred:

1. In holding that the power reserved by the decedent, to accelerate distribution to beneficiaries with indefeasibly vested interests, subjects the trusts to estate tax.

2. In not holding that Section 811(d)(2) of the Internal Revenue Code is not applicable to such a power.

Summary of Argument

Each beneficiary had an indefeasibly vested interest in the principal and income of the trust for his benefit, which would go to his heirs, legatees or assigns in the event of his death before the age of twenty-five. Such interest was not subject to defeasance (or reversion) in favor of alternative takers in the event of premature death. There was no such defeating condition which the decedent, by the exercise of the power, could remove by accelerated distribution.

There were no conditional interests in the beneficiary which the decedent could materialize by the exercise of any power or any alternative takers with an expectancy which the decedent could cut off by such exercise of any power, as was the case in *Commissioner* v. *Holmes*, *supra*. The decedent's power was not a substantive power to terminate contingencies upon which the right of enjoyment was staked. The power was only as to the time of enjoyment. It could

not have created or terminated any right of enjoyment of the property or changed the person or persons who were entitled to it.

In the *Holmes* case and every other case involving this question, with the exception of *Hays' Estate* v. *Commissioner*, 181 F. 2d 169 (CCA 5), the power to accelerate distribution was a power to remove a condition upon which the beneficiary's interest was based, and it was this substantive character of the power which was the sole basis for the imposition of the estate tax.

In *Hays' Estate* v. *Commissioner, supra*, the only case involving unconditionally vested interests in the beneficiary, the principle of the *Holmes* case was held not to be applicable, because the decedent did not have such a power to create or terminate any interest.

Section 811(d) has been applied consistently only to powers which reasonably might be deemed to constitute a substitute for testamentary disposition. In the instant case, the estate of any beneficiary who died prematurely would be subject to estate tax with respect to the undistributed principal and income of his trust, because of his ownership therein. If his interest were dependent upon the exercise or non-exercise of a power of the decedent, he would not have the ownership requisite for estate taxation. The power of the decedent cannot be deemed a substitute for testamentary disposition with respect to property over which the beneficiary has such a fundamental and independent ownership.

The creation of a trust under which the reserved power is only with respect to the time of distribution, constitutes a taxable gift. As such a power is insufficient to render the gift incomplete, it is likewise insufficient for estate taxation under Section 811(d).

The failure to distinguish between conditional interests, such as those in the *Holmes* case, and the unconditionally

vested interests in the instant case, would produce the extraordinary result of making Section 811(d) applicable to gifts by a grantor to an infant child, with himself as guardian for such child—since the child has vested ownership subject only to deferment of possession, and the guardian has discretionary power with respect to the distribution of income and principal.

Argument

The court below held that Section 811(d) was applicable to the power held by the decedent, upon the authority of the decision of this Court in *Commissioner* v. *Holmes*, *supra*. It predicated its position upon the following statement in this Court's opinion in that case, which it deemed "conclusive of the instant case" (R. 31):

> "It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which Section 811(d)(2) requires in order to avoid the tax."

In the *Holmes* case, the decedent created a fifteen year trust for each of his three sons. In the event of the death of a son before the expiration of fifteen years, the principal of his trust was to go to his issue or, failing such

issue, to the other sons or their issue. The decedent reserved the power to distribute or accumulate income and the power to terminate any of the trusts, in which event the principal was to go to the beneficiary entitled to the income.

Obviously, the interests of the sons in the *Holmes* case were not indefeasibly vested, as in the instant case, but were subject to defeasance by death during continuance of the trusts. The power of the decedent to terminate was a power to give the son principal which otherwise would go to other remaindermen, as provided in the trust instrument, in the event the son died during the continuance of the trust. On the other hand, by the non-exercise of the power to terminate or by the exercise of the power to accumulate income the decedent could give the principal or income to the alternative remaindermen in the event of the primary beneficiary's premature death. In so far as the economic interests of the beneficiaries were concerned, the son merely had an expectancy, dependent upon survivorship, which the decedent alone had the power to materialize by termination. It was a power to deprive the alternative remaindermen of their expectancy in favor of the son. Furthermore, there was a spendthrift provision which prevented the son from attempting to assign even his conditional interest.

The taxpayer in the *Holmes* case argued that the sons had a vested interest subject only to divestment by death. This Court rejected such arguments as to the niceties of technical title—whether the sons' interests were subject to a condition subsequent or condition precedent—and obviously based its decision upon the substantive reality that the decedent could, by the exercise of the power, confer an economic benefit on the beneficiary at the expense of someone else who might otherwise take. The decedent had the power at this death, by eliminating defeating contingencies, to consummate economic rights in one beneficiary adversely

to other beneficiaries who otherwise would benefit from the occurrence of the defeating event. To that extent it was a power to create a right of enjoyment in one beneficiary and to terminate co-relative rights in other beneficiaries.

We cannot see how the foregoing statement by this Court in the *Holmes* case, upon which the court below based its decision, can be regarded as "conclusive of the instant case," except by some inexplicable process of inversion. It is submitted that the statement, even literally, but especially when read in its factual context, is clearly antithetical in its meaning to the one ascribed to it by the court below. In the first place, it refers to "the power to terminate *contingencies* on which the *right* of enjoyment is staked." The "right" of enjoyment of the beneficiaries in the instant case was not based upon any contingencies as was the fact in the *Holmes* case. They had all of the rights of ownership of principal and income, subject only to the deferment of possession. They were in no different position than an infant or incompetent, the possession of whose property was in the hands of a guardian or committee. Subject to the deferment of possession, they could pass on their unconditionally vested interests to their heirs, legatees or inter-vivos assigns. Because the ownership of said interests was independently in them, immune from impairment or enlargement by any power of the decedent, said interests would be subject to estate tax in the event of the death of any beneficiary before the termination of his trust; *Kinney's Estate* v. *Commissioner*, 80 F. 2nd 568 (CCA 9); *Estate of John G. Frazer* v. *Commissioner*, 162 F. 2d 167 (CCA 3); but would not be so subject to estate tax if their interests had been conditional, as in the *Holmes* case. *Commissioner* v. *Rosser*, 64 F. 2d 631 (CCA 3).

In the second place, this Court, in the above passage, said: "More therefore is involved than mere acceleration of the time of enjoyment." The only reasonable meaning this

could have is that the result would have been different if only acceleration, as contrasted with the *right* of enjoyment, had been involved. This Court seemed to leave no doubt about this by stressing, in the next sentence, that "the very right of enjoyment is affected. * * *"

The lower court's assimilation of the instant case with the *Holmes* case disregards the factual realities, as well as the different legal implications of the purpose and scope of Section 811(d). In the instant case, the decedent did not, as in the *Holmes* case, have the power to shift economic interests between beneficiaries with conditional interests, either by materializing the expectancy of one beneficiary by eliminating the defeating condition as to him, at the expense of the other beneficiary, or by preserving the expectancy of the latter, at the expense of the former. A failure to recognize this basic factual difference would render meaningless the reasoning of this Court in the *Holmes* case, as is readily seen in the following conclusion drawn therefrom by the court below:

> "* * * As the Supreme Court said, it was not a mere question of acceleration of payment, of whether he should enjoy the property sooner or later, but whether he should enjoy it at all, or not. * * *" (R. 47).

Under this conclusion, any grantor who had the power merely to accelerate payment would automatically have the power over "whether he should enjoy it at all, or not"—because any beneficiary of any trust will not enjoy it at all if he dies before distribution, regardless of whether he has an unconditionally vested or contingent interest. Thus, if "enjoyment" is used solely in the sense of possession by the beneficiary, as the court below has obviously used it, then, *in all cases*, the power merely to accelerate payment is necessarily the same as the power to confer the right of enjoyment.

The court below, in effect, says that any power to give any beneficiary possession before his possible death is subject to Section 811(d). As every beneficiary is subject to the possibility of death at any time, any power to accelerate the *time* of enjoyment would be taxable. But what this Court said in the *Holmes* case was that "More therefore is involved than mere acceleration of the time of enjoyment"—that "The very right of enjoyment is affected, * * *."

If Section 811(d) were applicable to every power to accelerate the time of enjoyment, then it would seem that the distinction drawn and stressed throughout the opinion of this Court in the *Holmes* case, between a power merely to accelerate the *time* of enjoyment and a power over the *right* of enjoyment, would be meaningless and unnecessary.

The Court of Appeals for the 5th Circuit did not regard this distinction as meaningless, in *Hays' Estate* v. *Commissioner, supra,* the only decided case, other than the instant one, involving unconditionally vested interests. In that case, in which the decedent reserved the power to accumulate income and to terminate the trust at any time, the trust instrument provided that in the event of the death of of any of the beneficiaries, his interest "shall pass to his or her heirs at law under the laws of descent and distribution of the State of Mississippi." In that case, with which the court below in the instant case does not agree, the Court of Appeals recognized that the decision in the *Holmes* case turned on this very point—to be taxable the power has to be over the right of enjoyment rather than the mere acceleration of the time of enjoyment. The Court there said:

> "The exercise of the power of the decedent to terminate the trust could not have created or terminated any right of enjoyment of trust property or changed the person or persons who were entitled to enjoy it."

The beneficiaries in the *Hays* case had exactly the same interests in the principal and income as the beneficiaries in

the instant case had under New York law. The Court of Appeals, in a footnote, pointed out that this also would have been the case under Mississippi law in the absence of words of inheritance in the trust instrument. The court below in the instant case assumed, but did not decide, that the beneficiaries had unconditionally vested interests (R. 31). It is established beyond any doubt under New York law, which is controlling as to the character of the beneficiaries' interests, *Helvering* v. *Stuart*, 317 U. S. 154; *Blair* v. *Commissioner*, 300 U. S. 5, that the beneficiaries had unconditionally vested interests in the principal, *Manufacturers Trust Company* v. *Chase National Bank*, 282 N. Y. 790; *Cammann* v. *Bailey*, 210 N. Y. 19; *Connelly* v. *O'Brien*, 166 N. Y. 406, and in any income accumulated during minority, *Smith* v. *Parsons*, 146 N. Y. 116; *Morris* v. *Morris*, 272 N. Y. 110.

In every decision by a Court of Appeals or by the Tax Court of the United States involving this question, since the decision of this Court in the *Holmes* case, said decision by this Court has been interpreted as meaning that Section 811(d) is applicable only to powers over conditional interests. *Hays' Estate* v. *Commissioner, supra. Loughridge's Estate* v. *Commissioner*, 183 F. 2d 294 (CCA 10) cert. den. 340 U. S. 830.

> "His power under the trust instrument *affected not only the time of possession and enjoyment but also the the person or persons who might come into ownership and enjoyment of the property. The reservation of power to shift or vary in that manner the interests of the beneficiaries was a substantial attribute of ownership and control.*" (Italics supplied.)
>
> *Hauptfuhrer's Estate* v. *Commissioner*, 195 F. 2d 548 (CCA 2).

> "Each son's enjoyment of the remainder was uncertain in that it depended on his surviving until the termination of the trust. The settlor's reserved power of

termination was thus a power whereby the settlor could at any time not only accelerate the time of enjoyment, but *could transform an otherwise uncertain possibility of enjoyment into a certainty.*" (Italics supplied.)

Industrial Trust Co. v. *Commissioner*, 165 F. 2d 142 (CCA 1).

"Under Sec. 811 (d) the fact that the decedent can only choose among a limited class is immaterial. Commissioner v. Estate of Holmes, 1946, 326 U. S. 480, 66 S. Ct. 257, 90 L. Ed. 228; * * *. *But under Sect. 811 (d) only the interest that may be shifted is included in the gross estate.*" (Italics supplied.)

Commissioner v. *Hofheimer's Estate*, 149 F. 2d 733 (CCA 2).

"The test is not whether the change has to be brought about by an acceleration of the falling in date of remainders or in some other particular way but *whether the power reserved may be exercised to shift comparatively substantial economic benefits.*" (Italics supplied.)

Zirjacks v. *Scofield*, 197 F. 2d 688 (CCA 5).

"The powers reserved to the trustees by this indenture are even broader than those in the *Holmes* case, *supra*, of which the Supreme Court said that one who has the power to terminate contingencies upon which the *right of enjoyment* is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has a power which affects not only the time of enjoyment but one which is determinative of the persons who may enjoy the trust estate, *a power which affects the very right to enjoyment itself.*" (Italics supplied.)

Estate of Frank Clowe, 17 T.C. 1467.

No case has been found in which there is even any dictum to the effect that the decision in the *Holmes* case is applicable to a power to distribute an interest to one uncondi-

tionally vested therewith. The decision of the court below in the instant case stands alone against a uniformly contradictory judicial background.

Furthermore, the decision of the court below is in conflict with the basic principle established by this Court in the early cases involving Section 811(d), such as *Porter* v. *Commissioner*, 288 U. S. 436, and *Estate of Sanford* v. *Commissioner*, 308 U. S. 39. In the *Porter* case, this Court made it clear that only substantive powers are covered by Section 811(d); that is to say, powers whose termination by death constitutes a substitute for testamentary disposition.

> "His death terminated that control, ended the possibility of any change by him and was, *in respect of title to the property* in question, the source of valuable assurance passing from the dead to the living. *That is the event on which Congress based* the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in section 301 (26 USCA Secs. 1092, 1093) is called the net estate. Thus was reached *what it reasonably might deem a substitute for testamentary disposition.*" (Italics supplied.)

The assimilation of the instant case with the *Holmes* case is in conflict with the purposes of Section 811(d) and the rationale for its application which consistently run through the cases from the beginning. The underlying purpose of the estate tax provisions which impose estate tax upon the subject matter of lifetime transfers, is to prevent avoidance of estate tax by transfers which are essentially substitutes for testamentary disposition. *Porter* v. *Commissioner, supra; Helvering* v. *City Bank Farmers Trust Company*, 296 U. S. 85; *Estate of Sanford* v. *Commissioner, supra; Helvering* v. *Hallock*, 309 U. S. 106.

The decision in the *Holmes* case may be said to be merely an application of the basic principle, established in the foregoing cases, to a power of disposition between different conditional beneficiaries of the decedent's own designation. In the instant case, neither the creation of the trusts nor the expiration of the power upon the decedent's death can in any sense be viewed as "substitutes for testamentary disposition." The persons who would take from the beneficiary, if he died before distribution, would be persons beyond the designation or control of the decedent, namely, the beneficiary's heirs or legatees, or his living donees or assignees. That is far different from the power of the decedent in the *Holmes* case, by exercise thereof, to consummate otherwise conditional rights in the primary beneficiaries of his own selection and thereby to cut off completely the interests of alternative remaindermen also of his own selection or, by non-exercise thereof, maintain the interests of said alternative beneficiaries.

The "right of enjoyment" which the decedent had the power to confer in the *Holmes* case was more than immediate possession. It was the right to economic ownership.

The decision in the instant case is a variance from all of the other cases, which is neither required nor supported in principle, nor by any practical considerations. It is an unprecedented and extended application of Section 811(d), with serious and unjustified potential tax consequences. The decedent-grantor of such a trust would be subject to estate tax because of his supposed power over the property, and the beneficiary of the trust, in the event of his death before distribution, would himself be subject to estate tax with respect to the same property, because of his ownership of the principal and income interests therein. *Kinney's Estate* v. *Commissioner, supra.* It is readily apparent that the taxation of the beneficiary because he owns

the interest in the trust is completely inconsistent with any power of the decedent to create or effect said ownership. If the beneficiary's interests were dependent upon the exercise or non-exercise of a power by the decedent, he would not have the ownership requisite for estate taxation. *Commissioner* v. *Rosser*, *supra*. But he clearly does have such ownership.

However, in the instant case, we would have a tax upon the grantor-decedent on the theory that because of his retained powers his death effected a disposition in the nature of a substitute for a testamentary disposition, and another tax on the beneficiary because he had a vested interest which he received when the trust was created. This would be a perversion of the tax avoidance purpose of Section 811(d) into a special levy upon those unwary persons who created such trusts in bygone years without the slightest semblance of any tax avoidance motives, and, also, we might add, without the slightest reason to suspect that the fund they were so providently providing for the future of their children might suffer the improvidence of such tax invasion.

Furthermore, no matter where or how one tries to articulate the decision of the Court below in the instant case with the body of developed tax law, it is a square peg in a round hole. The gift tax regulations (Section 86.3(a)) provide that "a gift in trust is incomplete if the donor reserves the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves," but provides, contrariwise, that "a gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof." It is submitted that, if the reserved powers are not sufficient to render the gift incomplete, they are likewise insufficient for estate taxation under Section 811(d).

While this Court, in *Smith* v. *Shaughnessy*, 318 U. S. 176, and *Robinette* v. *Helvering*, 318 U. S. 184, pointed out that it was not intended in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, to establish a general principle that gift and estate taxes are "always" mutually exclusive, it did not question the mutual exclusiveness of such taxes in the *Sanford* case, which involved Section 811(d) powers. This Court merely refused to extend such exclusiveness to cases involving interests reserved to the grantor, such as reverter interests and reserved life estates, as contrasted with the reserved powers in the *Sanford* case. That it did not intend to alter the applicability and rationale of the *Sanford* decision in cases involving reserved powers, seems evident from the following statement in the opinion in the *Shaughnessy* case, at p. 181:

> "The separable interests transferred are not gifts to the extent that power remains to revoke the trust or recapture the property represented by any of them, Burnet v. Guggenheim, supra, or to modify the terms of the arrangement *so as to make other disposition of the property*, Sanford v. Commissioner of Internal Revenue, supra. In the Sanford case the grantor could, by modification of the trust, extinguish the donee's interest at any instant he chose. In cases such as this, where the grantor has neither the form nor substance of control and never will have unless he outlives his wife, we must conclude that he has lost all 'economic control' and that the gift is complete except for the value of his reversionary interest." (Italics supplied.)

It also alluded as follows, at page 179 of the same case, to the fact that Congress intended some gifts to be subject to estate tax and "some not."

> "It is sufficient to note here that Congress plainly pointed out that 'some' of the 'total gifts' subject to gift taxes . . . may be included for estate tax pur-

poses *and some not.*' House Report No. 708, 72d Cong. 1st Sess., p. 45." (Italics supplied.)

It seems clear that trusts involving the question of Section 811(d) powers are an exception to the general principle that gift and estate taxes are not always mutually exclusive. No other type of transfer would seem to have any better reason to stand in that position. Accordingly, in view of the fact that the reserved powers in the instant case would not render the gift incomplete, they should not serve as the basis for estate tax.

Imposition of the estate tax in those cases where the beneficiaries have unconditionally vested interests, merely because of a power to accelerate their possession, would require the blanketing under Section 811(d) of gifts by a grantor to an infant child, with himself as guardian for the child. Section 811(d) covers any interest of which the decedent "has at any time made a transfer, by trust *or otherwise*, * * *." Such an infant, for whom the grantor acts as guardian, has vested ownership rights subject to deferment of possession of the principal, and the guardian has discretionary power with respect to distributions of income and principal. And such a guardian is subject to the same supervision as a trustee. If the line cannot be drawn short of the trusts in the instant case, then it is submitted that a grantor-guardian would likewise be subject to Section 811(d). Certainly, such a result could not have been within the presumed legislative intent.

In short, the decedent did not have a power to "alter, amend or revoke" under Section 811(d). To say that his power to make early distribution was such a power is as unrealistic as to say that a mortgagor who has a right to anticipate payments has reserved the power to alter, amend or revoke the debt created by him and owned by the mortgagee.

This case does not contain any of the aspects sought to be reached by the estate tax provisions as substitutes for testamentary disposition. The transfers were not to take effect at death. The decedent did not reserve any enjoyment to himself, nor did he reserve any power of disposition among others.

It is respectfully submitted that the unprecedented application of Section 811(d) in the instant case is neither required by, nor finds support in, the *Holmes* case or other cases dealing with that section, and is contrary to the purpose of said section. Furthermore, in view of the penalising tax aspects, such a departure from or extension of the scope of Section 811(d), as heretofore applied, should not be adopted, in the absence of the mandate of a clearly expressed legislative intent or impelling practical considerations of the revenue, neither of which factors is present in this case.

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that there may be a final determination of whether a power such as the decedent had is within the scope of the estate tax statute in question.

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Appendix

Section 811(d)(2) of the Internal Revenue Code:

"(2) *Transfers on or prior to June 22, 1936*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph."

Section 86.3(a) of Regulations 108:

"As to any property, or part thereof or interest therein, of which the donor so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power the terms of the power must be examined and its scope determined.

"A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life,

where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted]30

LOUIS LOBER, CHARLES LOBER and ALMA T. LOBER, as Executors of the Last Will and Testament of Morris Lober, Deceased,
Petitioners,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 606

LOUIS LOEBL, CHARLES LOEBL AND ALMA T. LOEBL, as Executors of the Last Will and Testament of Morris Loebl, Deceased,

Petitioners,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Claims (R. 29-35) is reported in 106 F. Supp. 731. The dissenting opinion of Chief Judge Jones (R. 32-33) is also reported therein.

Jurisdiction

The jurisdiction of this Court rests upon 28 U. S. C. Section 1255(1). The judgment of the Court of Claims was entered on December 2, 1952 (R. 36). A motion for rehearing, filed by petitioners on December 31, 1952, was overruled on February 3, 1953 (R. 36). The time for filing

petition for writ of certiorari, under 28 U. S. C. Section 2101(c), was thereby extended until ninety days after February 5, 1968. *Mores v. United States*, 390 U. S. 161. The petition for writ of certiorari was filed April 1, 1968, and was granted on June 3, 1968 (R. 37).

Question Presented

Where a decedent creates a trust, under which any accumulated income is to be paid to the income beneficiary at his majority and the principal is to be paid to said beneficiary at age twenty-five, and said beneficiary has a vested interest in said income and principal which would descend to his heirs if he died before receiving the same, does a reserved power, possessed by the decedent at the time of his death, to accumulate income during minority and to pay the principal to said beneficiary before he is twenty-five, bring the principal of the trust within the decedent's gross estate, for Federal estate tax purposes?

Statutory Provisions Involved

Internal Revenue Code:

Sec. 811. Gross Estate.

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States * * *
>
> * * * *
>
> (d) *Revocable Transfers.*
>
> * * * *
>
> (2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or

In conjunction with any person, in other capacity, or revokable, or when the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, the property of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is inconsistent under this paragraph.

(26 U. S. C. 1942 ed. Sec. 811.)

Statement

The facts pertaining to the question presented here, as set forth in the stipulation of facts (R. 36-39) and as found by the Court of Claims (R. 24-26), may be summarized as follows:

Morris Leber, the decedent, died a resident of the State of New York on December 15, 1942. In 1924 and 1929 he had created essentially identical trusts for each of his three children (R. 5, 9, 12). The principal of each respective trust was to be paid over to the child when he reached the age of twenty-five. The decedent, who was the trustee of each of the trusts, had the discretion to accumulate income during the minority of the child, which accumulated income was to be paid to the child upon his attaining majority. The child was the sole designated beneficiary of the income and principal, with no alternative remainderman provided in the event of his death before the age of twenty-five. The decedent, as trustee, had the power to make distributions of principal to the beneficiary, the amount and time of such distributions resting in his discretion. There was no spendthrift provision in any of the trust instruments (R. 5, 9, 12).

The United States asserted a deficiency of estate tax, the part thereof involved in this proceeding being on the ground that the principal of said trusts was includible in the taxable estate (R. 34). On February 20, 1947, the petitioners, as executors, paid said deficiency, with interest (R. 34).

On April 22, 1947, a claim for refund was duly filed in the amount of $[illegible], with interest thereon of $[illegible], representing the portion of said deficiency that is involved in this proceeding, which was rejected in its entirety by the Commissioner of Internal Revenue (R. 26).

The Court of Claims held that said trusts were includible in the taxable estate, under Section 811(d)(2) of the Internal Revenue Code, on the authority of *Commissioner* v. *Holmes*, 326 U. S. 480 (R. 28-32).

Specifications of Error to be Urged

The court below erred:

1. In holding that the power reserved by the decedent, to accelerate distribution to beneficiaries with indefeasibly vested interests, subjects the trusts to estate tax.

2. In not holding that Section 811(d)(2) of the Internal Revenue Code is not applicable to such a power.

Summary of Argument

Each beneficiary had an indefeasibly vested interest in the principal and income of the trust for his benefit, which would go to his heirs, legatees or assigns in the event of his death before the age of twenty-five. Such interest was not subject to defeasance in favor of alternative takers, or reversion to the grantor, in the event of premature death. There was no such defeating condition which the decedent, by the exercise of the power, could remove by accelerated distribution.

There were no conditional interests in the beneficiary which the decedent could materialize by the exercise of any power or any alternative takers with an expectancy which the decedent could cut off by such exercise of any power, as was the case in *Commissioner* v. *Holmes*, *supra*. The decedent's power was not a substantive power to terminate

contingencies upon which the right of enjoyment was vested. The power was only as to the time of enjoyment. It could not have created or terminated any right of enjoyment of the property or changed the person or persons who were entitled to it.

In the *Holmes* case and every other case involving this question, with the exception of *Hays' Estate* v. *Commissioner*, 148 F. 2d 109 (CCA 6), the power to accelerate distribution was a power to remove a condition upon which the beneficiary's interest was based, and it was this substantive character of the power which was the sole basis for the imposition of the estate tax.

In *Hays' Estate* v. *Commissioner*, *supra*, the only case involving a power to accelerate distribution of unconditionally vested interests, the principle of the *Holmes* case was held not to be applicable, because the decedent did not have such a power to create or terminate any interest.

In *Theopold* v. *United States*, 164 F. 2d 404 (CCA 1), in which the beneficiaries also had unconditionally vested remainders, and the decedent reserved the power to make certain amendments, the *Holmes* case, likewise, was held inapplicable because the reserved power was not one under which the decedent could legally alter beneficial interests in the trusts, either directly or indirectly.

Section 811(d) has been applied consistently only to powers which reasonably might be deemed to constitute a substitute for testamentary disposition. In the instant case, the estate of any beneficiary who died prematurely would be subject to estate tax with respect to the undistributed principal and income of his trust, because of his ownership therein. If his interest were dependent upon the exercise or non-exercise of a power of the decedent, he would not have the ownership requisite for estate taxation. The power of the decedent cannot be deemed a substitute for testamentary disposition with respect to property over which the beneficiary has such a fundamental and independent ownership.

The creation of a trust under which the reserved power is only with respect to the time of distribution, constitutes a taxable gift. As such a power is sufficient to render the gift incomplete, it is likewise insufficient for estate taxation under Section 811(d).

The failure to distinguish between conditional interests, such as those in the *Goldstone* case, and the unconditionally vested interests in the instant case, would produce the extraordinary result of making Section 811(d) applicable to gifts by a guardian to an infant child, with himself as guardian for such child—since the child has vested ownership subject only to determent of possession, and the guardian has discretionary power with respect to the distribution of income and principal.

Argument

The court below held that Section 811(d) was applicable to the power held by the decedent, upon the authority of the decision of this Court in *Commissioner v. Holmes*, *supra*. It predicated its position upon the following statement in this Court's opinion in that case, which it deemed "conclusive of the instant case" (R. 31):

> "It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donations. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which Section 811(d)(2) requires in order to avoid the tax."

In the Holmes case, the decedent created a fifteen year trust for each of his three sons. In the event of the death of a son before the expiration of fifteen years, the principal of his trust was to go to his issue by testamentary disposition, in the other case of their issue. The trustee reserved the power to distribute or accumulate income and the power to terminate any of the trusts, in which event the principal was to go to the beneficiary entitled to the income.

Obviously, the interests of the sons in the trusts were not indefeasibly vested, as the income might or might not be distributed by the trustee during the duration of the trusts. The power of the decedent to terminate was a power to give the principal which otherwise would go to other remaindermen, as provided in the trust instrument, to the sons that during the duration of the trusts. On the other hand, by the non-exercise of the power to terminate or by the exercise of the power to accumulate income, the decedent could give the principal or income to the alternative remaindermen in the event of the primary beneficiary's premature death. In effect, the [illegible] interests of the beneficiaries were contingent, and could not be said to constitute property rights vested in the decedent. Since only the power to accumulate income was exercised by the trustee in favor of the sons, the Supreme Court held that there was a qualitative provision which prevented the tax from attempting to assign even the [illegible]

The language in the Holmes case [illegible] a vested interest existed only to the extent to which the Court rejected such arguments as to the [illegible] cal fiction whether the sons' interests were subject to a condition subsequent or condition precedent and obviously based its decision upon the substantive reality that the decedent could, by the exercise of the power, confer an economic benefit on the beneficiary at the expense of someone else who might otherwise take. The decedent had the

power at this death, by eliminating defeating contingencies, to consummate economic rights in one beneficiary adversely to other beneficiaries who otherwise would benefit from the nonoccurrence of the defeating event. To that extent it was a power to create a right of enjoyment in one beneficiary and to terminate correlative rights in other beneficiaries.

We cannot see how the foregoing statement by this Court in the *Holmes* case, upon which the court below based its decision, can be regarded as "conclusive of the instant case," except by some inexplicable process of inversion. It is submitted that the statement, even literally, but especially when read in its factual context, is clearly antithetical in its meaning to the one ascribed to it by the court below. In the first place, it refers to "the power to terminate contingencies on which the right of enjoyment is staked." The "right" of enjoyment of the beneficiaries in the instant case was not based upon any contingencies as was the fact in the *Holmes* case. They had all of the rights of ownership of principal and income, subject only to the deferment of possession. They were in no different position than an infant or incompetent, the possession of whose property was in the hands of a guardian or committee. Subject to the deferment of possession, they could pass on their unconditionally vested interests to their heirs, legatees or intestates; and they could, in effect, consume said interests by incurring indebtedness to which they would be subject upon their death. Because the ownership of said interests was independently, in them, immune from impairment or enlargement by any power of the decedent, said interests would be subject to estate tax in the event of the death of any beneficiary before the termination of his trust; *Kinney's Estate v. Commissioner*, 30 F. 2nd 650 (CCA 9); *Estate of John S. Fraser v. Commissioner*, 168 F. 2d 167 (CCA 5), but would not be so subject to estate tax if their interests had been conditional, as in the *Holmes* case. *Commissioner v. Hesser*, 64 F. 2d 621 (CCA 3).

In the second place, this Court, in the above passage, said: "More therefore is involved than mere acceleration

of the time of enjoyment." The only reasonable meaning this could have is that the result would have been different if only acceleration, as contrasted with the right of enjoyment, had been involved. This Court seemed to have no doubt about this by stressing, in the next sentence, that "the very right of enjoyment is affected. * * *"

The lower court's assimilation of the instant case with the *Holmes* case disregards the factual realities, as well as the different legal implications of the purpose and scope of Section 37.7(d). In the *Holmes* case, the decedent did not, as in the instant case, have the power to shift economic interests between beneficiaries with conditional interests, either by materializing the expectancy of one beneficiary by eliminating the defeating condition as to him, at the expense of the other beneficiary, or by preserving the expectancy of the latter, at the expense of the former. A failure to recognize this basic factual difference would render meaningless the reasoning of this Court in the *Holmes* case, as is readily seen in the lower court's application of the following conclusion drawn therefrom by it to the facts in the instant case:

> * * * As the Supreme Court said, it was not a mere question of acceleration of payment, of whether he should enjoy the property sooner or later, but whether he should enjoy it at all, or not. * * * (R. 31)

By this interpretation—with no discrimination between conditional and unconditional interests—any grantor who had the power merely to accelerate payment would automatically have the power over "whether he should enjoy it at all, or not"—because, by such synonymy of enjoyment and possession, any beneficiary of any trust will not enjoy it at all if he dies before distribution, regardless of whether he has an unconditionally vested or contingent interest. Thus, if "enjoyment" is used solely in the sense of possession by the beneficiary, as the court below has obviously used it, then, *in all cases*, the power merely to accelerate payment is necessarily the same as the power to confer the right of enjoyment.

The court below, in effect, says that any power to give any beneficiary possession before his possible death is subject to Section 811(d). As every beneficiary is subject to the possibility of death at any time, any power to accelerate the time of enjoyment would be taxable. But what this Court said in the *Holmes* case was that "More therefore is involved than mere acceleration of the time of enjoyment"—that "The very right of enjoyment is affected. * * *."

If Section 811(d) were applicable to every power to accelerate the time of enjoyment, then the distinction drawn and stressed throughout the opinion of this Court in the *Holmes* case, between a power merely to accelerate the *time* of enjoyment and a power over the *right* of enjoyment, would be meaningless and unnecessary.

The Court of Appeals for the 6th Circuit did not regard this distinction as meaningless, in *Hoge's Estate v. Commissioner*, *supra*, the only decided case, other than the instant one, involving a power to accelerate distribution to beneficiaries with unconditionally vested remainders. In that case, in which the decedent reserved the power to accumulate income and to terminate the trust at any time, the trust instrument provided that in the event of the death of any of the beneficiaries his interest "shall pass to his or her heirs at law under the laws of descent and distribution of the State of Mississippi." In that case, with which the court below in the instant case does not agree, the Court of Appeals recognized that the decision in the *Holmes* case turned on this very point—to be taxable the power has to be over the right of enjoyment rather than the mere acceleration of the time of enjoyment. The Court there said:

> "The exercise of the power of the decedent to terminate the trust could not have created or terminated any right of enjoyment of trust property or changed the person or persons who were entitled to enjoy it."

The beneficiaries in the *Hoge* case had exactly the same interests in the principal and income as the beneficiaries in

the instant case had under New York law. The Court of Appeals, in a footnote, pointed out that this also would have been the case under Mississippi law in the absence of words of inheritance in the trust instrument. The court below in the instant case accepted but did not decide that the beneficiaries had unconditionally vested interests (R. 31). It is established beyond any doubt under New York law, which is controlling as to the character of the beneficiaries' interests, *Helvering v. Stuart*, 317 U. S. 154; *Blair v. Commissioner*, 300 U. S. 5, that the beneficiaries had unconditionally vested interests in the present. *Manufacturers Trust Company v. Chase National Bank*, 282 N. Y. 120; *Cammann v. Bailey*, 240 N. Y. 29; *Connolly v. O'Brien*, 166 N. Y. 406, and in any income accumulated during minority, *Smith v. Parsons*, 146 N. Y. 116; *Morris v. Morris*, 272 N. Y. 181.

In every decision by a Court of Appeals or by the Tax Court of the United States touching this question since the decision of this Court in the *Holmes* case, said decision by this Court has been interpreted as meaning that Section 811(d) is applicable only to powers over conditional interests. The following are some of those decisions:

Hays' Estate v. Commissioner, supra.

"His power under the trust instrument *affected* not only the time of possession and enjoyment but also the person or persons who might come into ownership and enjoyment of the property. The reservation of power to shift or vary in that manner the interests of the beneficiaries was a substantial abridgment of ownership and control." (Italics supplied.)

Loughridge's Estate v. Commissioner, 183 F. 2d 294 (CCA 10) cert. den. 340 U. S. 830 (at page 300).

"Each son's enjoyment of the remainder was uncertain in that it depended on his surviving until the termination of the trust. The settlor's reserved power of termination was thus a power whereby the

...ability could at any time not only accelerate the time of enjoyment, but could transform an otherwise uncertain expectancy of enjoyment into a certainty." (Italics supplied.)

Hamilton's Estate v. Kelly, 195 F. 2d 248 (CCA 2) (at page 251).

"Under Reg. 111 (f) the fact that the decedent was only a remote donee of a limited class is immaterial. Commissioner v. Estate of Holmes, 1948, 326 U. S. 480, 66 S. Ct. 278, 90 L. Ed. [illegible]. But under that rule only the interest that may be shifted is considered in the gross estate." (Italics supplied.)

Industrial Trust Co. v. Commissioner, 165 F. 2d 728 (CCA 1) (at page 730).

"The test is not whether the change has to be brought about by an acceleration of the falling in date of possession or in some other particular way but whether the power reserved may be exercised to shift economically substantial economic benefits." (Italics supplied.)

Commissioner v. Holmes's Estate, 149 F. 2d 798 (CCA 1) (at page 805).

"The power reserved to the trustees by this indenture is a power similar to that given in the *Holmes* case, supra, of which the Supreme Court said that one who has a power to terminate contingencies upon which the right of enjoyment is shifted, so as to make certain the enjoyment by those [illegible] who may never come into it if the power is not exercised, has a power which affects not only the time of enjoyment but one which is determinative of the persons who may enjoy the trust estate, a power which affects the very right to enjoyment itself." (Italics supplied.)

Zinjacke v. Seofield, 137 F. 2d 685 (CCA 5) (at page 690).

See also

Estate of Frank Clowe, 17 T. C. 1467 (at page 1472).

In *Theopold* v. *United States*, *supra*, the decedent had created a trust for his three infant children. He reserved the power to amend the trust instrument so that "it will more clearly express my intentions." The trust instrument provided that if a child over 21 died, the share from which he was receiving income was to be paid over to his executor or administrator. Pursuant to his power to amend, the decedent amended this provision by giving his children a testamentary power of appointment, with provision for alternative distribution in default of exercise of the power. The Court held that, while this was more than a mere clarifying amendment, it was not a substantive change and was not indicative of an intention by the decedent to reserve the kind of a power that would subject the trust to estate tax. The Court based its entire inquiry in that case upon the premise that this Court has established the principle that only powers to alter substantive or beneficial interests give rise to tax.

> "Since we construe the power not as one under which the decedent up to the time of his death could legally alter beneficial interests in the trust, either directly as in Porter v. Commissioner, 288 U. S. 436, 53 S. Ct. 451, 77 L. Ed. 880, or in practical effect as in Commissioner v. Estate of Holmes, 326 U. S. 480, 66 S. Ct. 257, 90 L. Ed. 228.
>
> "The judgment of the District Court is reversed and the case is remanded to that court for the entry of a judgment for the plaintiff."

No case has been found in which there is even any dictum to the effect that the decision in the *Holmes* case is applicable to a power to distribute an interest to one unconditionally vested therewith. The decision of the court below in the instant case stands alone against a uniformly contradictory judicial background.

Furthermore, the decision of the court below is in conflict with the basic principle established by this Court in the early cases involving Section 811(d), such as *Porter* v. *Commissioner*, 288 U. S. 436, and *Estate of Sanford* v.

Commissioner, 306 U. S. 39. In the *Porter* case, this Court made it clear that only substantive powers are covered by Section 811(d), that is to say, powers whose termination by death constitutes a substitute for testamentary disposition.

> "His death terminated that control, ended the possibility of any change by him and was, in respect of title to the property in question, the occasion of valuable interests passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in section 301 (26 USCA Secs. 1092, 1093) is called the net estate. Thus was reached *what it reasonably might deem a substitute for testamentary disposition.*" (Italics supplied.)

The assimilation of the instant case with the *Holmes* case is in conflict with the purposes of Section 811(d) and the rationale for its application which consistently run through the cases from the beginning. The underlying purpose of the estate tax provisions which impose estate tax upon the subject matter of certain lifetime transfers, is to prevent avoidance of estate tax by transfers which are essentially substitutes for testamentary disposition. *Porter v. Commissioner, supra; Helvering v. City Bank Farmers Trust Company*, 296 U. S. 85; *Estate of Sanford v. Commissioner, supra; Helvering v. Hallock*, 309 U. S. 106.

This basic legislative purpose was reaffirmed by this Court, as follows, in *Commissioner of Internal Revenue v. Church*, 335 U. S. 632 (at page 643):

> "We declared that the statute now under consideration 'taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes inter vivos transfers that are too much akin to testamentary dispositions not to be subjected to the same excise,' p. 112, and inter vivos gifts 'resorted to, as a substitute for a will, in making dispositions of property operative at death,' p. 114."

The decision in the *Holmes* case may be said to be merely an application of the basic principle, established in the foregoing cases, to a power of disposition between different conditional beneficiaries of the decedent's own designation. In the instant case, neither the creation of the trusts nor the expiration of the power upon the decedent's death can in any sense be viewed as "substitutes for testamentary disposition." The persons who would take from the beneficiary, if he died before distribution, would be persons beyond the designation or control of the decedent. No individual or class of persons was designated by the decedent to receive the income or principal in the event that the named beneficiary died before receiving the same. The right to designate that person or class of persons, or any other recipient, rested exclusively with the beneficiary. In the event that the beneficiary did not exercise that right, by either inter-vivos or testamentary disposition, the recipients would be determined by the applicable laws of descent—not by the decedent. How can it be cogently urged that the decedent could make any choice between the named beneficiary and said beneficiary's heirs when the latter are still carried within the beneficiary during his lifetime?

The equitable ownership to all of the trust property was vested in the named beneficiary and his heirs. It is clear that no retained control of the decedent could "alter, amend or revoke" that ownership. That is far different from the power of the decedent in the *Holmes* case, by exercise thereof, to consummate otherwise conditional rights in the primary beneficiaries of his own selection and thereby to cut off completely the interests of alternative remaindermen also of his own selection or, by non-exercise thereof, to maintain the interests of said alternative beneficiaries.

The "right of enjoyment" which the decedent had the power to confer in the *Holmes* case was more than immediate possession. It was the right to economic ownership. In the *Holmes* case, the Government itself recognized

and urged this fundamental aspect. In its brief, in that case, [illegible] page 17:

> "The above-described subjection of the beneficial interests in the trust to the decedent's powers to control or eliminate their enjoyment can hardly be described, with any accuracy, as a subjection of those interests to a mere power to accelerate enjoyment. . . ."

The decision of the court below in the instant case is a variance from all of the other cases, which is neither required nor supported in principle, nor by any practical considerations. It is an unprecedented and extended application of Section 811(d), with serious and unjustified potential tax consequences. The decedent-grantor of such a trust would be subject to estate tax because of his supposed power over the property, and the beneficiary of the trust, in the event of his death before distribution, would himself be subject to the estate tax with respect to the same property, because of his ownership of the principal and income interests therein. *Kenner's Estate v. Commissioner, supra.* It is readily apparent that the taxation of the beneficiary because he owns the interest in the trust is completely inconsistent with any power of the decedent to create or effect said ownership. If the beneficiary's interests were dependent upon the exercise or non-exercise of a power by the decedent, he would not have the ownership requisite for estate taxation. *Commissioner v. Kenner, supra.* But he clearly does have such ownership.

Despite such ownership by the beneficiary, there would be a tax upon the grantor-decedent on the theory that because of his retained powers his death effected a disposition in the nature of a substitute for a testamentary disposition, and another tax on the beneficiary because he had a vested interest which he received when the trust was created. This would be a perversion of the tax avoidance purpose of Section 811(d) into a special levy upon those unwary persons who created such trusts in bygone years without the slight-

ent semblance of any tax avoidance motives, and, also, we might add, without the slightest reason to suspect that the fund they were so providently providing for the future of their children might suffer the improvidence of such tax invasion.

Furthermore, no matter where or how one tries to articulate the decision of the Court below in the instant case with the body of developed tax law it is a square peg in a round hole. Section 811(c) of the gift tax regulations (Appendix) provides that "a gift in trust is incomplete if the donor reserves the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves," but provides, contrariwise, that "a gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof." It is submitted that, if the reserved powers are not sufficient to render the gift incomplete, they are likewise insufficient for estate taxation under Section 811(d).

While this Court, in *Smith v. Shaughnessy*, 318 U. S. 176, and *Helvering v. Helvering*, 316 U. S. 106, pointed out that it was not intended in *Estate of Sanford v. Commissioner*, 308 U. S. 39, to establish a general principle that gift and estate taxes are "always" mutually exclusive, it did not question the correct conclusiveness of such cases as the *Sanford* case, which involved Section 811(d) powers. This Court merely refused to extend such conclusiveness to cases involving interests reserved to the grantor, such as reversion interests and reserved life estates, as contrasted with the reserved powers in the *Sanford* case. That it did not intend to allow the applicability and conclusiveness of the *Sanford* decision in cases involving reserved powers, seems evident from the following statement in the opinion in the *Shaughnessy* case, at p. 181:

> "The separable interests transferred are not gifts to the extent that power remains to revoke the trust or recapture the property represented by any of them, Burnet *v.* Guggenheim, supra, or to modify the

terms of the arrangement *so as to make other disposition of the property.* Sanford *v.* Commissioner of Internal Revenue, *supra.* In the Sanford case the grantor could, by modification of the trust, extinguish the donee's interest at any instant he chose. In cases such as this, where the grantor has neither the form nor substance of control and never will have unless he outlives his wife, we must conclude that he has lost all 'economic control' and that the gift is complete except for the value of his reversionary interest." (Italics supplied.)

It also alluded as follows, at page 179 of the same case, to the fact that Congress intended some gifts to be subject to estate tax and "some not."

> "It is sufficient to note here that Congress plainly pointed out that 'some' of the 'total gifts subject to gift taxes . . . may be included for estate tax purposes *and some not.*' House Report No. 708, 72d Cong. 1st Sess., p. 45." (Italics supplied.)

It seems clear that trusts involving the question of Section 811(d) powers are an exception to the general principle that gift and estate taxes are not always mutually exclusive. No other type of transfer would seem to have any better reason to stand in that position. Accordingly, in view of the fact that the reserved powers in the instant case would not render the gift incomplete, they should not serve as the basis for estate tax.

The said test of whether a transfer is subject to estate tax is whether or not the gift is incomplete until the donor's death. *Helvering* v. *Hallock*, *supra*, in which this Court said the following, at pages 113 and 114:

> "By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor. * * *
>
> * * *
>
> 'However we label the device it is but a means by which the gift is rendered incomplete until the donor's death.'"

In the instant case, the gifts were complete when made. The beneficiaries in any event had the indefeasible right to receive all of the principal and all of any accumulated income at twenty-five or, if they died before attaining that age, their assigns or estates would, through them, receive said principal and income, if they had not already been consumed by debts incurred by the beneficiaries. And that also would have been the case if the decedent had not reserved the power to accelerate distribution. These gifts of all of the principal and income were complete when the transfers were made and were not "rendered incomplete until the donor's death." The gifts were not rendered incomplete by any reserved enjoyment by the decedent, as in the *Church* case, nor by any reserved power, as in the *Holmes* case, to divert them to anyone other than those in whom they were fixed by the transfers.

The power of the decedent, in the instant case, could not serve to withhold from the beneficiaries that which already was theirs from the beginning by virtue of the transfers. Certainly, if the power had been absent, there could be no question that the gifts were complete when made. How, then, could the same gifts, complete without the power, be rendered incomplete by a power that could not hamt or restrict them in any way? The gifts, with or without the power to accelerate, were equally complete at the time of the transfers and nothing passed from the deed to the living at the time of the grantor's death, within the contemplation of any of the estate tax provisions having to do with inter-vivos transfers. *Shukert* v. *Allen*, 273 U. S. 547. See Regulations 105, Sec. 81.17 (see Appendix) containing the following as an example of a transfer which is not subject to estate tax:

> "*Example (4).* The decedent, during his life, transferred property in trust, providing for payment of the income to his son until the latter reached the age of 25, at which time the son would receive the corpus. If the son died before reaching 25, the corpus was to revert to the decedent if living; and if not,

it was to pass to his son's heirs. His portion of the property is includible in the decedent's gross estate. Although the property may revert to the decedent, his son can obtain possession or enjoyment of the remainder interest even though the decedent is living. Thus, the first requirement is not satisfied."

Imposition of the estate tax in these two cases, where the beneficiaries take specifically vested interests, merely because of a power to accelerate that possession would require the blanketing under Section 811(d) of gifts by a grantor to an infant child with himself as guardian for the child. Section 811(d) covers any interest of which the decedent "has at any time made a transfer, by trust or otherwise, . . ." Such an infant, for whom the grantor acts as guardian, has vested ownership rights subject to deferment of possession of the principal, and the guardian has discretionary power with respect to distributions of income and principal. And such a guardian is subject to the same supervision as a trustee. If the line cannot be drawn short of the trusts in the instant case, then it is submitted that a grantor-guardian would likewise be subject to Section 811(d). Certainly, such a result could not have been within the presumed legislative intent.

In short, the decedent did not have a power to "alter, amend or revoke" under Section 811(d). To say that his power to make early distribution was such a power is an unrealistic as to say that a mortgagor who has a right to anticipate payments has reserved the power to alter, amend or revoke the debt created by him and owned by the mortgagee.

This case does not contain any of the aspects sought to be reached by the estate tax provisions as substitutes for testamentary dispositions. The transfers were not to take effect at death. The decedent did not reserve any enjoyment to himself, nor did he reserve any power of disposition among others.

It is respectfully submitted that the unprecedented application of Section 811(d) in the instant case is neither required by, nor finds support in, the *Helvering* case or other cases dealing with that section, and is contrary to the purpose of said section. Furthermore, in view of the penalising tax aspects, such a departure from or extension of the scope of Section 811(d), as heretofore applied, should not be adopted, in the absence of the mandate of a clearly expressed legislative intent or impelling practical considerations of the revenue, neither of which factors is present in this case.

Conclusion

The decision of the Court of Claims is incorrect and should be reversed.

Respectfully submitted,

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Appendix

Section 25.2(a) of Regulations 105:

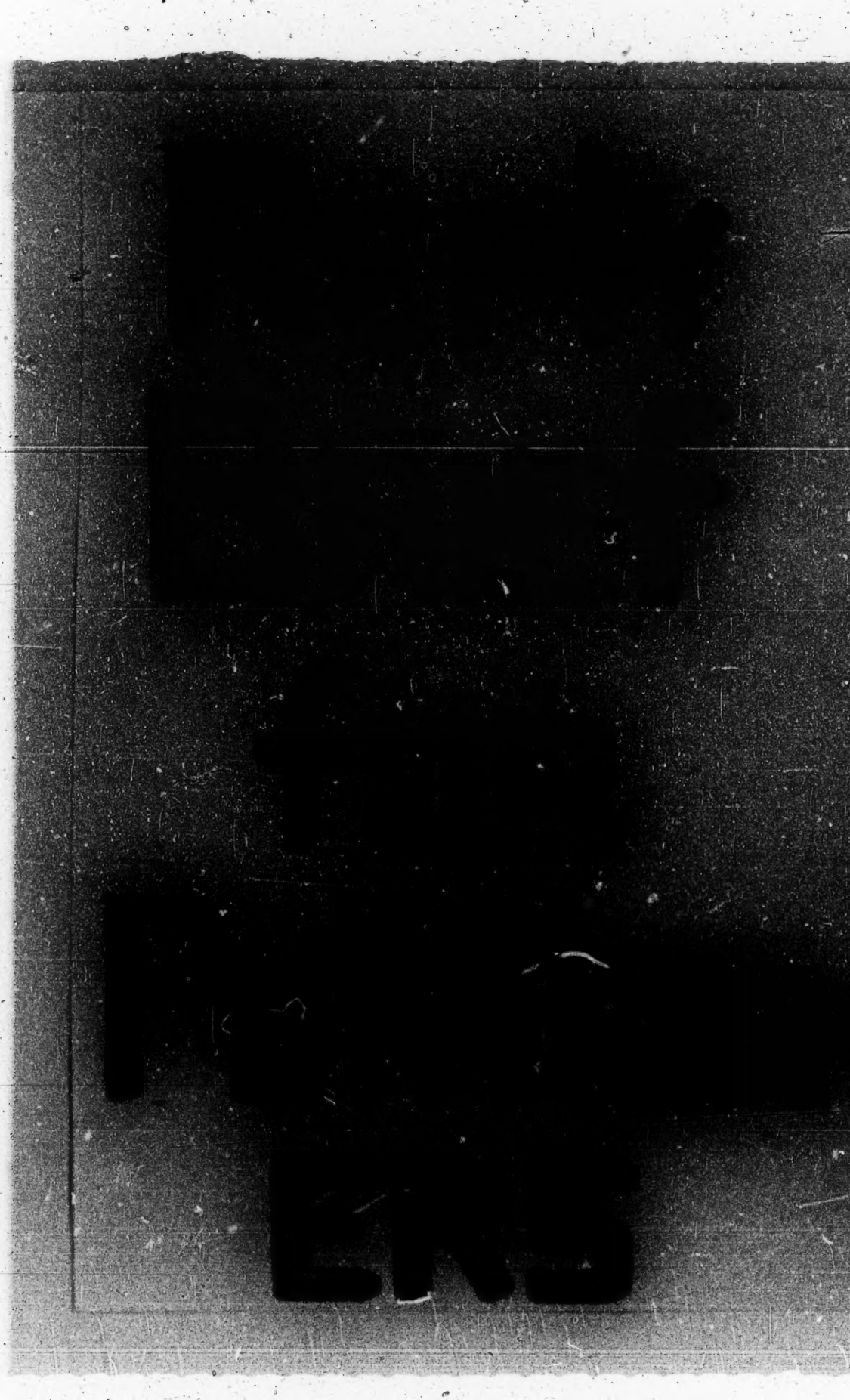
"As to any property, or part thereof or interest therein, of which the donor so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power the terms of the power must be examined and its scope determined.

"A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life, where, by an exercise of the power, the estate may be terminated or cut down to one of less value, is incomplete. A restriction upon the extent to which the power may be so cut down constitutes an incomplete gift. If in this example the power was unlimited as to the right to cut down the estate for life to one for a term of five years, the valuation of an estate for life or for more than that term results in a gift to that extent complete."

Section 81.17 of Regulations 105, as amended by T. D. 5512, 1946-1 Cum. Bull. 264:

"Sec. 81.17. *Transfers Intended to Take Effect At or After the Decedent's Death.* A transfer of an interest in property by the decedent during his life (other than a bona fide sale for an adequate and full consideration in money or money's worth) is 'intended to take effect in possession or enjoyment at or after his death,' and hence the value of such property interest is includible in his gross estate, if

[redacted]



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 30

LOUIS LOBER, CHARLES LOBER and ALMA T. LOBER, as Executors of the Last Will and Testament of Morris Lober, Deceased,
Petitioners,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1953

No. 30

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Petitioners,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

The argument in this case was had before this Court on October 16, 1953. This reply brief is filed pursuant to permission to do so granted by the Court at the time of the argument.

The respondent in its brief contends (1) that, whether or not the interests of the beneficiaries were indefeasibly vested, the power reserved by the decedent was a power to change the enjoyment of the interests he had transferred, and (2) that in any event the interests of the beneficiaries were not vested, so that there is no basis for distinguishing the *Holmes* decision.

It is submitted that, on the first point, the respondent's brief is not responsive to the authorities set forth in the

petitioners' principal brief, and that, for the reasons set forth in the petitioners' principal brief and in this reply brief, the decedent did not have the power to change the enjoyment of the interests at the time of his death. On the second point, the respondent significantly avoids the abundant decisions in New York dealing directly with the dispositive pattern involved in the trusts in the instant case, and suggests a non-existent differentiation between *inter vivos* and testamentary trusts, on the basis of an irrelevant decision in another jurisdiction and the respondent's own construction of what the law of New York ought to be in the instant case.

I

The decedent did not have the power to change the enjoyment of the transferred interests, within the contemplation of Section 811(d).

In effect, it is the respondent's argument, throughout Point I of its brief, that even if the beneficiaries had indefeasibly vested interests, a power by the decedent to give them immediate possession, which possession they might not otherwise receive personally, was a power to change enjoyment. The word "enjoyment" is susceptible of such an interpretation only if it is isolated from the context of all other considerations having a vital bearing upon the case, namely, the background and purpose of Section 811(d); the fact that other means of effecting personal enjoyment were already available to the beneficiaries through assignment of their interests; and the fact that, at the time of the decedent's death, the beneficiaries were infants and anticipatory distributions by the decedent would, under New York law, have had to be made to their guardian—so that early distribution or termination by the decedent would not have given the beneficiaries the untrammeled possession required to constitute "enjoyment" under the respondent's own argument.

1. As pointed out on pages 13 to 15 of the petitioners' principal brief, this Court has consistently pointed out and stressed in a number of cases that only substantive powers are covered by Section 811(d), that is to say, powers whose termination by death constitutes a substitute for testamentary disposition. It would be sheer fantasy to suggest that the trusts in the instant case were conceived or intended as, or were in fact, substitutes for a testamentary disposition. In creating the trusts, the decedent may very well have been motivated by a desire to remove the completely donated property from his taxable estate, but he could not have had any notion of reserving to himself the freedom or power to redirect to other beneficiaries the course of the property given away or shift the interests between beneficiaries. Presumably, the provision for distribution at age 25, with a power to accelerate distribution, reflected uncertainty by the decedent that the beneficiaries would be sufficiently capable of receiving the property at 21, and the decedent desired to provide a four-year margin of safety in that regard. The possibility of the death of a beneficiary before age 25 during the decedent's lifetime was so remote as to furnish no rational basis for attributing to the decedent any possible motive to reserve a power akin to a testamentary disposition. If he desired to retain any substantive powers that could furnish anything remotely resembling a testamentary design, he would most certainly have adopted a much more comprehensive and effective means of doing so.

2. The respondent (Br. 19, 24) contends that the fact that the alternative takers, in the event of the death of the primary beneficiary, are specified by the New York Decedent Estate Law in the instant case and were designated in the trusts in the *Holmes* case makes no difference. It is submitted that the interpretation and administration of our tax laws has not become so tenuous as to warrant such a disregard of the legal and substantive realities as is tacit in such a conclusion. In the first place, one of the beneficiaries was capable of determining his own distributees by will (Br. 18), and those who would take by intestate

cooperation from the other beneficiaries would take through said beneficiaries and not from the decedent, and their liability was not subject to disposition or control by the decedent. The fact that the decedent, at his death, may have been one of the heirs of a beneficiary would not, as seems to be suggested in respondent's brief (Br. 19), establish a reversion to the decedent of such an intangible interest.

Estate of Oberlin D. Marshall, 19 T. C. 918, affirmed 203 F. (2d) 556.

3. There was a spendthrift provision in the trust in the *Holmes* case but none in the instant trusts. In the instant case, there was no restriction on the alienation by the beneficiaries of their remainder interests.

Section 15 *of New York Personal Property Law*;
In re Brand, 156 Misc. 312;
Commissioner v. Hall, 153 F. (2d) 173 (CCA 2).

As a matter of fact, the beneficiaries, even while infants, had the power, through the general guardian of their property, to effect an alienation of their remainder interests. Their vested interests constituted their own property and, as to such property, they could, being over the age of 14, have such a guardian appointed on their own petition. Section 178 of the *Surrogate's Court Act of New York*, which provides that a guardian of the property of an infant over 14 may be appointed solely on the infant's own petition, if he is of sound mind.

Accordingly, the beneficiaries, without the concurrence by the decedent of any power, could, through sale and assignment of their interests, have effected the equivalent of personal realization, which the respondent insists is "enjoyment". The fact that the consideration realized on any such sale would be held and administered by a guardian, would, as is pointed out below, be no different than the result of termination of a trust by the decedent, because

in the latter case the principal would also have to be turned over to a guardian for the infant.

Such an anticipatory realization by sale would unquestionably constitute enjoyment by the beneficiaries. It is well established that, for tax purposes, anticipatory realization of money or property, which is not payable or deliverable until some future date, by assignment of the right thereto for a consideration, constitutes enjoyment.

Lucas v. Earl, 281 U. S. 111;
Helvering v. Eubank, 311 U. S. 122;
Helvering v. Horst, 311 U. S. 112.

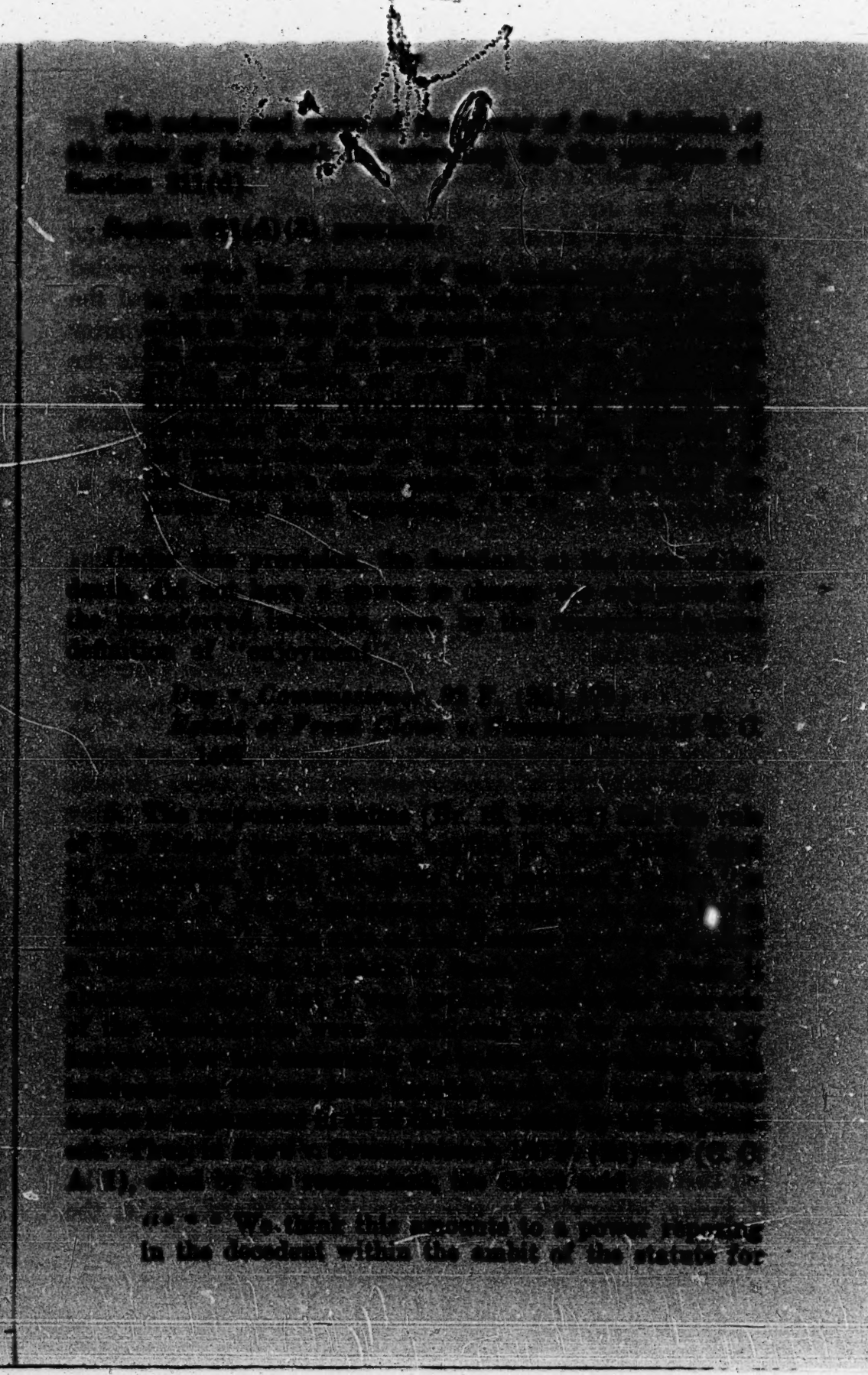
At this point, reference should be had to *Miller v. Driscoll*, 117 F. (2d) 477, so heavily relied on by the respondent (Br. 3, 18-20, 24). In that case, in which the decedent had the power to terminate the beneficiaries were given a testamentary power of appointment. They had no vested interests which they could realize (a fruition realization by assignment). The respondent (Br. 29) stressed the fact that in that case the beneficiaries did not have "a present right to use or invest or dispose of the property". Even in that case the Court of Appeals for the Third Circuit refused and held that "a shift of economic benefits has been accomplished" and clearly determined that the decedent could relinquish testamentary powers and had (at most) a power to alter enjoyment by a mental hesitancy. The same Court of Appeals in the later case of *Rossmiller's Estate v. Commissioner*, 156 F. (2d) 646, again said:

"But under Sec. 811(f) only the interest that may be enjoyed is included in the gross estate."

4. The respondent (Br. 28), apparently in ignorance of the New York law with respect to the administration of trusts in that respect, states:

"* * * As trustee, viewing the situation in practical terms, the decedent was free to turn over both income and accumulated principal for all the motor cars

[redacted]



. . . We think this amounts to a power reposing in the decedent within the ambit of the statute for

> It is incompatible that he had the power to reduce or eliminate altogether the shares of the daughter's issue, heirs or appointees. * * *."

In *Sharp's Estate v. Commissioner*, 154 F. (2d) 966 (C. C. A. 3), cited by the respondent, the trust provided income to the children for life, and upon the death of the last child the principal was to go to the issue of the grantor living at the grantor had the power to terminate the trust upon the consent of the children. The court held that the children did not have an interest adverse to termination, because termination would give them the "absolute property" in the corpus, as compared to only the income to which they were otherwise entitled.

In *Commissioner v. Rossbold's Estate*, 156 F. (2d) 634 (C. C. A. 2), cited by the respondent, the interests of the beneficiaries in the income and principal were contingent. The Court said:

> "* * * If anything is clear from this rather obscurely drawn trust indenture, it is that 'No person * * * as a beneficiary shall have any absolute or vested right to receive from income any payments either directly or for his benefit * * *' (paragraph VI). Thus the exercise of the power to terminate would, depending on the time when it was exercised, *determine the beneficiaries among whom the income would be divided, and similarly as to corpus of the trust estate.* We think the case falls squarely within *Commissioner v. Estate of Holmes*, 326 U. S. 480, 66 S. Ct. 257." (Italics added.)

In *Longbridge's Estate v. Commissioner*, *supra*, cited by the respondent, the trust provided income to each of the grantor's two children, and when the younger child reached 40, or upon the death of the survivor of them before reaching that age, a share of the principal was to go to the child, *if living*, otherwise to others specified. Here, again, the

Court stressed the fact that there was a power with respect to contingent interests.

> "* * * His power under the trust instrument affected not only the time of possession and enjoyment but also the person or persons who might come into ownership and enjoyment of the property. The reservation of power to shift or vary in that manner the interests of the beneficiaries was a substantial attribute of ownership and control. And a donor who keeps within the range of his power such sweeping hold over the possession and enjoyment of trust property has not divested himself of the degree of control required by the statute in order to avoid liability for estate tax. Commissioner v. Holmes, 326 U. S. 480, 66 S. Ct. 257, 90 L. Ed. 228." (Italics added.)

Hauptfuhrer's Estate v. *Commissioner*, *supra*, cited by the respondent, and referred to above, also involved expressly conditional interests.

6. In the *Holmes* case, this Court said that "More therefore is involved than the mere acceleration of the time of enjoyment. The very right of enjoyment is affected, . . ."

As pointed out in detail on pages 11 and 12 of the petitioners' brief, the Tax Court and the Courts of Appeal for the First, Second, Third, Fifth and Tenth Circuits understood this Court to mean in the *Holmes* case, that Section 811(d) is applicable only to powers to shift interests between conditional beneficiaries.

Industrial Trust Co. v. *Commissioner*, 165 F. (2d) 142 (C. C. A. 1);
Commissioner v. *Hoffheimer's Estate*, 149 F. (2d) 733 (C. C. A. 2);
Hauptfuhrer's Estate v. *Commissioner*, 126 F. (2d) 548 (C. C. A. 3);
Zirjacks v. *Scofield*, 197 F. (2d) 688 (C. C. A. 5);

Kings' Estate v. Commissioner, 181 F. (2d) 169 (C. C. A. 5);
Estate of Frank Clowe, 17 T. C. 1467.

In the only cases involving unconditional interests, other than the instant case, it has been decided that the rule in the *Holmes* case is not applicable.

Kings' Estate v. Commissioner, supra;
Barney v. Kyle, U. S. District Court, 4th Div., Minn., decided July 21, 1952.

In the latter case, the deed of trust provided for discretionary payments of income to the daughter of the settlor until the latter's death, at which time the principal and accumulated income were to be paid over to the daughter. The trustees, one of whom was the settlor, had the power to "use such amounts out of the principal from time to time as in their judgment and discretion they may deem necessary and advisable for the care, comfort, support and maintenance of said Mary B. Struthers." It should be noted that the trustees could apply principal to the use of the beneficiary, whereas in the instant case the absence of such a power to apply would require any distributions to be made to the guardians of the infant beneficiaries.

The opinion in this case would serve as an excellent brief for the position of the petitioners. Pertinent excerpts from the Court's opinion are as follows:

"• • • The mere control of the time when the beneficiary, or those whom the beneficiary designates, may enjoy the fund does not constitute the substantial control over the property contemplated by the statute which should subject the decedent's estate to the tax in question.

• • •

The power to terminate the trust as disclosed therein merely clothed the trustees with the right to determine the time of enjoyment by the beneficiary. In

other words, the power to terminate could not be exercised so as to effect a change as distinguished from the time of the enjoyment by those who had a vested equitable interest therein. That vested interest existed without any right of the trustor to change or modify it. . . . The enjoyment of this trust was irrevocably vested in the named beneficiary, or upon his death, if that occurred prior to the trustor's, in his heirs. No control vested in the trustor to alter, amend, revoke, or terminate such enjoyment. . . ."

. . .

". . . There may be language in the Holmes decision which seems to give support to the Government's rather tenuous position in this regard. But such language should be construed in light of the particular facts which are clearly distinguishable from the facts disclosed in the present controversy. The pertinent statutes do not justify a strained and wholly unreasonable construction of the undisputed facts herein in light of the applicable Illinois law. Moreover, it is cogently urged that the trustor could make any choice between the named beneficiary and the beneficiary's heirs when the latter are still carried within the beneficiary during his lifetime. Moreover, any such attempted choice could be thwarted at any time by the beneficiary's last will and testament.

". . . As stated, the trustor in the Holmes case reserved the right during his lifetime to terminate all the trusts and to distribute the principal with the accumulated income to the beneficiary then entitled to receive it. By accomplishing the purpose of terminating the trust, the control of the enjoyment of the trust income and fund and its disposition among the parties designated by the trustor was retained. The Supreme Court construed, therefore, that the right of the trustor to terminate the trust and distribute the principal, or to delay the payment of any income or the corpus to any of the named beneficiaries provided the trustor with the power to determine *which person or persons named by the*

trustor should have the enjoyment of the estate. * * * In the Holmes case, therefore, it was the trustor who designated the contingent beneficiaries and retained the power to make certain that the named beneficiary would receive the trust fund rather than the designated contingent beneficiaries, and it was concluded that this power affected not only the time of enjoyment but also the person or persons who might enjoy the benefits of the trust. * * * Here, we have no contingent benefits which may be defeated by the acts of the trustees. Here, if the trustees accumulated the income and did not choose to pay it over to the named beneficiary, nevertheless upon the death of the beneficiary, the entire trust interest would pass to his estate, and out of which his creditors would be able to obtain satisfaction. While the trust fund would be immune from the claims of creditors during the life of the beneficiary, upon his death the immunities of the trust indenture in that regard would not apply. Consequently, the beneficiary during his lifetime would enjoy the benefits of the fund and the credit standing it would afford him even though the fund was not paid to him until the termination of the trust or to his estate upon his death. *There was no way, therefore, contingently considered, that the trustees could deprive the named beneficiary from enjoying the benefits of the estate.* He could either enjoy the income or fund during the existence of the trust, and upon termination of the trust, the entire corpus, or if he died before the termination of the trust, his named devisees and his creditors would enjoy the benefits thereof. It is the beneficiary, therefore, and not the trustees, who had the power to determine who should enjoy the equitable interest which was donated by the trustor."

II

Under the law of New York, it is absolutely clear that the income and principal interests of the beneficiaries were indefeasibly vested.

1. The question of property rights in New York trusts is solely a question of New York law; and the law as established in New York is controlling.

Helvering v. *Stuart*, 317 U. S. 154;
Blair v. *Commissioner*, 300 U. S. 5.

What the law may be in other jurisdictions, or what it ought to be in New York, is irrelevant.

2. The question of whether or not a future interest is vested is controlled by statute in New York, namely, Section 40 of the Real Property Law, which provides as follows:

> "Sec. 40. *When future estates are vested; when contingent.*—A future estate is either vested or contingent. It is vested, where there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the persons to whom or the event on which it is limited to take effect remains uncertain."

And, Section 11 of the Personal Property Law of New York provides that the rules prescribed in relation to future interests in real property shall be applicable to personal property.

The statutory provision, now appearing as Section 40 of the Real Property Law, was placed in the New York statutes in 1830 as Section 13 of the Revised Statutes. This section and related provisions were enacted to avoid the uncertainties in which the subject was involved. It altered substantially the common law distinction between vested and contingent remainders in favor of a vested interpretation. It created an unwillingness by the Courts of New

York to hold an estate subject to divestment by implying a condition of survivorship which was not expressed.

Moore v. *Littel*, 41 N. Y. 66;
Hennessy v. *Patterson*, 85 N. Y. 91;
Matter of Bowers, 195 App. Div. 548; affirmed 231 N. Y. 613;
Matter of Elting, 268 App. Div. 74, affirmed 294 N. Y. 941;
Herzog v. *Simpson*, 154 N. Y. 496.

In the leading case of *Moore* v. *Littel* (1869), *supra*, Judge Woodruff, speaking for the Court of Appeals said:

> "I deny the right to interpolate qualifications drawn from the refined reasoning of cases or text-books, prior to the statute, to limit the operation of its plain terms."

3. The statutory provisions in New York have been considered and applied by the New York courts in a great many cases over the years and the interpretative principles hereinafter outlined have been well established.

(a) In the absence of a clear intent to the contrary, an estate will be construed as vested rather than contingent. It is the well settled rule in New York that the law favors the vesting of estates, and "unless a contrary intention is unequivocally expressed in the creating instrument, such intention will not be imputed."

Allen v. *White*, 116 N. Y. S. (2d) 223;
Bolton's Will, 257 App. Div. 760, affirmed 282 N. Y. 728;
Matter of Watson's Will, 262 N. Y. 284;
In Re Cramer's Estate, 47 N. Y. S. (2d) 826;
In Re Lurrie's Will, 60 N. Y. S. (2d) 155.

(b) A complete showing of indefeasible vesting of remainders is deemed to exist where, as here, (1) a specific or segregated fund is provided for (2) a named beneficiary

(rather than a class) (3) who is also the income or primary beneficiary (4) with no words of survivorship or provision for alternative takers in the event of the death of the beneficiary. In fact, some but less than all of the foregoing factors have been held sufficient to constitute vesting in a long line of cases, of which the following are but a few:

Matter of Staats, 272 App. Div. 139, affirmed 297 N. Y. 648;
Cammann v. *Bailey*, 210 N. Y. 19;
Matter of Schmitt, 137 App. Div. 286;
Montgomery's Estate, 258 App. Div. 64, affirmed 282 N. Y. 713.

(c) The respondent suggests the application of the so-called "divide and pay over" rule (Br. 10, 38). This rule, if it has any remaining vitality, which is doubtful, is an expedient of last resort which is subordinated to all other rules of construction. In any event, it could have no possible application, except to confirm the contingent character of the gift in those cases where the words of futurity themselves contain the only provision for the gift. The respondent itself (Br. 38) states the rule as follows: "Where the only words of gift are found in the direction to divide or pay at a future time the gift is future, not immediate; contingent and not vested." The rule has no place whatsoever in any case involving a provision of a specific fund for a named beneficiary who is also the primary beneficiary, and where no survivorship condition or alternative takers are provided.

In Re Montgomery's Estate, 258 App. Div. 64, affirmed 282 N. Y. 713;
In Re Fedder's Trust, 61 N. Y. S. (2d) 335 (inter vivos trust);
Fulton Trust Co. v. *Phillips*, 218 N. Y. 573.

The lack of significance of the "divide and pay over" doctrine, upon which the respondent seems to place so much

reliance, is outlined as follows in Section 260 of the *Restatement on Property*.

> "Sec. 260. *Direction to Divide and Pay Over at a Future Date.*
>
> "In a limitation purporting to create a remainder or an executory interest, the fact that the only word of gift to the intended taker thereof consists of a direction to divide and pay over, or to convert, divide and pay over, at the end of the created prior interests or at some other future date is not a material factor in determining the existence of a requirement of survival to the date of distribution.
>
> * * *
>
> "*Comment:*
>
> "a. Rationale. This Section denies the validity and significance of the so-called 'divide and pay over' rule. Wherever this 'divide and pay over' rule has been asserted to exert constructional force in favor of the existence of a condition precedent of survival, two exceptions to the rule have been also recognized and one or both of these exceptions always applies to any situation which is within the rule itself. The first of these exceptions states that the rule has no significance if the postponement of the division and payment is for the purpose of letting in an intermediate interest. * * *"

(d) There is a long and unbroken line of New York cases in which vesting has been found on the basis of the same dispositive pattern as in the instant case, that is, payment of principal to income beneficiary upon attainment of a specified age.

Matter of Staats, supra.

Income of a trust of $5,000 made payable to grandson "until he shall arrive at the age of thirty years and then said fund, principal and accumulated interest be paid to him." No gift-over was provided in the event of the death of the grandson before the age of thirty. The grandson died intestate at the age of twenty-eight.

Held that the principal of the trust "absolutely vested" in the grandson upon the creation of the trust, and was a part of his estate. The decision was based primarily upon the facts that a specific segregated fund was provided—for a named beneficiary, rather than a class—and the remainderman was the income beneficiary.

Commons v. *Bailey*, 210 N. Y. 19.

Residuary trust for wife for life; at her death to be divided, *per stirpes*, into trusts for children of the decedent; "upon the attaining of the age of thirty years by either of my sons the principal of the share until that time held for such son shall after the death of my wife be paid over, transferred or conveyed to him." No contingent remainder-over was provided in the event of the death of a son after the testator's death. A son died at the age of twenty-three before the death of the wife of the testator.

Held, that the principal of the trust was indefeasibly vested in the son upon the death of the testator, and was a part of the deceased son's estate—even though the enjoyment of income and principal was deferred until the death of the testator's wife.

Fulton Trust Company v. *Phillips*, 218 N. Y. 573.

In this case, the Will provided:

> "*First.* To pay over to said Elizabeth Newton the net annual income of the share so set apart for her benefit, for and during the term of her natural life and from and after her decease to her children in equal shares until they shall respectively attain the age of twenty-one years, and as each of such children shall reach that age to pay over to him or her an equal proportionate part of the principal of said share and of the net accrued income thereof. * * *"

The Court of Appeals said:

> "In the case now under consideration, we think that the intention of the testatrix is clear, that the

gift of the residuary estate is absolute and only the time of payment is postponed. Futurity is not annexed to the substance of the gift."

To the same effect are *Matter of Talbot*, 126 Misc. 80, in which the principal was to be paid to the beneficiary at age 40, and *Zartman v. Dittmars*, 87 App. Div. 173, where it was to be paid to the beneficiary at age 30.

(c) The words "when", "then", "from and after", etc., relate merely to the time of possession and not to the time of vesting.

Herzog v. Simpson, 154 N. Y. 493;
Connelly v. O'Brien, 166 N. Y. 406, in which the Court said:

"A remainder is not to be considered as contingent in any case where it may fairly be construed to be vested, since the law favors the vesting of estates. The adverbs of time, therefore, such as *when, then, after, from* and *after*, etc., in a devise of a remainder limited upon a life estate, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest. * * *"

4. In the light of standards prevailing in other jurisdictions, the actual conclusions and decisions reached by the New York Courts reflect an extremely strong judicial inclination towards vesting. In fact, the New York Courts, in finding vested interests, frequently subordinate express conditional provisions to the contrary, or ascribe to an adverb a different time reference than would appear to be warranted by the literal meaning thereof, or in some other manner that obviously runs counter to the views and practices prevailing in other states. Undoubtedly, a circumstance which has played an important part in engendering the extreme inclination toward vesting is the stringent "two lives in being" New York rule against the suspension of alienation, and the desire of the courts to obviate the unfortunate consequences in many cases of an inadvertent violation of said rule. The following cases are a few ex-

amples of how far the courts of New York go in seeking and finding indefeasibly vested interests:

Manufacturers Trust Company v. Chase National Bank, 171 Misc. 49, affirmed 258 App. Div. 787, affirmed 282 N. Y. 790.

In this case the income of a part of an inter vivos trust was to be applied to the use of the grantor's niece "until she should attain the age of 25 years, at which event she shall thereupon become entitled absolutely to said equal part." The niece died after the death of the grantor and before attaining age 25. The Court of Appeals of the State of New York affirmed the decision of the Supreme Court that the niece's estate was entitled to the corpus. In spite of the apparently conditional phrase "in which event," an intention to vest an indefeasible remainder was found. This case illustrates how far the New York courts go in finding an implied gift of an absolutely vested remainder, rather than a reverter, where the possession of the corpus is deferred—much further than the facts in the instant case call for.

Connelly v. O'Brien, 166 N. Y. 406.

The Will provided that the income of the residuary estate was to go to the wife for life, and then the principal was to be paid "to such of my children as may then be alive, share and share alike." A daughter of the testator died before the wife.

It was held that the daughter's remainder vested indefeasibly upon the death of the testator. The Court of Appeals outlined the applicable judicial rule in New York as follows:

> "There could be little doubt with respect to the meaning of this will but for the use of the word then in the last line. The construction to be given to the instrument does not depend, however, upon grammatical rules or any close analysis of the

language employed, but upon settled principles applicable to all wills. A remainder is not to be considered as contingent in any case where it may fairly be construed to be vested, since the law favors the vesting of estates. The adverbs of time, therefore, such as *when, then, after, from* and *at* etc. in a devise of a remainder limited upon a life estate, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest. * * *"

See also *Allen* v. *White*, 116 N. Y. S. (2d) 223, involving facts similar to those in *Connelly* v. *O'Brien*, *supra*.

III

There is no distinction in New York between inter vivos and testamentary trusts, in determining the character of future interests.

In its brief in the Court below (p. 34), the respondent admitted that, if the instant trusts were testamentary, the remainders would be indefeasibly vested under the New York decisions, but contended that the result is, or should be, different where a living trust is involved. In its brief in this Court, the respondent argues along the same lines.

As pointed out above, on page 13, Section 40 of the *Real Property Law of New York*, which controls the construction of future interests, had its origin in Section 13 of the Revised Statutes of 1830. One of the principal purposes of the New York Revised Statutes of 1830 was to abolish any distinctions between future estates based solely on whether they were created by deed or by will. The Notes of the Original Revisers of the Revised Statutes (Note to 1 R. S. 722, sec. 7) state that their object was "to abolish all technical rules and distinctions, having no relation to the essential nature of property * * * and to

reduce all expectant estates substantially to the same class, and apply to them the same rules whether created by deed or devise."*

Accordingly when the New York courts were presented with the question of implying a survivorship condition in connection with an inter vivos trust they refused to do so. *Matter of Seeley*, 195 App. Div. 548, aff'd 231 N. Y. 613 (1921), *supra*. That case resulted in the application of the same rule against implied survivorships as exists with respect to testamentary trusts. The settlor, by deed *inter vivos*, established a trust of personal property, giving a life estate and a general testamentary power of appointment over the corpus to his daughter Mary. In default of appointment, the corpus was given to the settlor's children, Marion and William, in equal shares, "the issue of either then deceased taking its parent's share by representation, and if one be then deceased leaving no issue the survivor to take the whole, and if both be then deceased, only one leaving issue, such issue to take the whole".

The contest was between the executors of the settlor's estate and the Comptroller of the State of New York involving the taxability of the trust under Section 220 of the New York Inheritance Transfer Tax Law, a provision substantially similar to Section 811(d). The State of New York contended that there was a possibility of reversion. The court held that the issue had a vested interest and that the grantor had given up everything. In doing so, the court said:

> "In my opinion, there is nothing in this deed that tends to qualify or cut down the absolute character of the gift."

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* Appendix III, p. 1378 of Fowler's *The Real Property Law of the State of New York* (3d Ed., 1909). Fowler's comment, op. cit. at p. 52 was "The revisers intended to bring the rules relative to limitations of estates into harmony. * * * they made the new rules about future estates apply to both wills and grants alike. These were immense and comprehensive changes, and fertile of great results in modern law."

Manufacturers Trust Company v. Chase National Bank, supra.

In this case, discussed above at page 18, the trustee was to pay a share of the income to the settlor "until she shall" [illegible] the death of the settlor, the trustee was to pay over the principal to the settlor's daughter. The settlor died [illegible] fact that the trustee [illegible] with the decision [illegible] with the decision [illegible] briefs on the [illegible] inter vivos trust [illegible] spondent points out (Br. 23) the court stated that it was not nothing more in the trust deed than the conditional clause above referred to, the settlor's remainder would have been contingent upon her attaining the age of 21 years. The Court, obviously, had considerable difficulty in overcoming the force of said conditional phrase, but, with the usual abhorrence in New York of a failure of a trust and of a reversion to the settlor, the court sought to find a negation of the expressly conditional words in the grant that she attains the age of 21 years. In the last part the trust deed provided a gift-over in the event of the death of the settlor during the lifetime of the settlor, and from that a presumed intent by the settlor to reserve nothing to herself under the circumstances that transpired and for which no provision was made. If inter vivos trusts were not so susceptible of a finding of vesting as testamentary trusts, then, surely, this was a case in which a failure of the trust should have been found.

In Re Fedder's Trust, 61 N. Y. S. (2d) 385.

Income to the settlor for life, then income to his daughter for life; upon her death, the trustees "shall pay over

[redacted]

[redacted]

[redacted]

The following expression from the court's opinion in the recent case *of Allen v. Trust Co.*, 116 N. Y. S. (2d) 228, again confirms the fact that, in construing instruments for the purpose of ascertaining whether remainders are vested or not, the New York courts recognize no distinction between inter vivos and testamentary trusts:

> "From the extensive judicial expression on the subject of future vesting, immutable, certain basic and fundamental canons of construction have evolved which serve as unerring guideposts for use in the penetration and determination of the intention of a testator or a settlor, which, of course, is the paramount and controlling factor to be sought. The law favors as a matter of policy the early vesting of future estates. Unless there is a contrary intention unequivocally expressed in *the creating instrument*, the postponement of the vesting will not be imputed. Matter of Bolton's Will, 257 App. Div. 760, 15 N. Y. S. 2d 696, * * *." (Italics supplied.)

In this connection, it should not be overlooked that the principal purpose of the original enactment of the statutory provision, which is now Section 40 *of the Real Property Law of New York*, was to abolish any differentiation between inter vivos and testamentary trusts, in so far as the construction *of future estates* is concerned.

While the New York law is controlling in determining the nature of property rights under a trust, for Federal tax purposes, it is noteworthy that it is also the prevailing rule in other jurisdictions that the considerations in applying gifts in testamentary instruments are equally applicable to *inter vivos* dispositions. *Brock v. Hall*, 33 Cal. (2d) 885. In 11 A. L. R. 2d 683 (annotations to *Brock v. Hall*) this matter is summed up as follows, with many citations:

> "The generally prevailing doctrine accords with the view expressed by the majority opinion in *Brock v. Hall* (1949), 33 Cal. 2d 885, 206 P. 2d 360, 11 A. L. R. 2d 672, that inasmuch as 'the primary duty of

the court in construing all documents is to give effect to the intention of the maker; that is, no justification for any distinction in this regard between instruments creating legal estates and those taking effect at death exists; the intention to be gathered from the words of a conveyance, whether they be contained in a declaration of trust or a will, would ordinarily be the same. Accordingly, 'implied gifts may be found in both wills and later vested transfers in trust.' " (p. [illegible])

In that connection, the following observation is made in said annotation, at page 467, with respect to *Chater* v. *Carter*, 283 U. S. 219, cited by the respondent (Br. 8, 27), and hereinafter discussed:

"... Many of the authorities dealing with cross remainders in deeds, rest support as is given to the proposition that a gift by implication cannot arise from an estate vested by instrument executed chiefly of indefinite expressions used by the Federal Supreme Court in one case, the somewhat similar language found in the opinion of the Hawaii Supreme Court in the same case, and the statements of doctrine contained in the dissenting opinion in *Brock* v. *Hall* (1940) 15 Cal. 2d 500, 102 P. 2d 760, 11 A. L. R. 2d 674."

In those sections of the Restatement of Property (1936) dealing with the many facets of the construction of trusts, there are repeated and interchangeable references to "wills" and "deeds", some of which are the following: Sections 115, comment (c); 257, comment (c); 258, comment (c). Furthermore, in the introductory note to topic 3, preceding all of the sections with respect to limitations of remainders or executory interests, it is clearly indicated that all of them deal with deeds as well as wills. Volume 3 of Restatement of Property (p. 1245).

The rules of construction set forth in Section 257 of the Restatement of Property, applicable alike to wills and deeds, are of special interest in this case, as they deal, among other things, with future interests of the kind in-

volved in this case, that is to say, trusts involving remainders where possession is deferred to a specified age. Very pertinent excerpts therefrom are the following from comment (d):

> "d. *Situations commonly within the stated rule.* When a remainder or an executory interest is limited to a person presently identified (see Sect. 356, Comment a, as to the types of limitations effective for this purpose) with an added phrase 'payable when he becomes 21,' or 'to be had by him at 21,' or 'to be turned over to him when (the youngest of a designated group) attains 21,' or with some other phrase of similar import, the limitation is within the rule stated in this Section. * * *
>
> * * * An application of the rule stated in this Section to such limitations as are described in the first paragraph of this Comment, by eliminating the condition precedent of survival, normally leaves the created interest free from all requirements of survival and hence, if it is a remainder, *indefeasibly vested.*" (Italics added.)

In fact, in the only cases other than the instant case involving Section 811(d), in which the taxpayer contended that said section does not apply where vested interests are involved, the Courts held that the interests were vested.

Hays' Estate v. Commissioner, 181 Fed. (2d) 169 (in which the Court noted that, under Mississippi law, the remainders would have been vested without the words of heirship in the creating instrument).

In *Barney v. Kelm*, *supra*, discussed above at page 10, a deed of trust involving facts similar to those in the instant case, was held to have created a vested remainder in the beneficiary, under Minnesota law.

See also 1 *Scott Trusts*, Sec. 142.1, page 715, and annotations in 112 A. L. R. 581, 585.

The equality of the treatment of inter vivos and testamentary trusts is sometimes stated to be based upon the

presumption that all such grants are taken most strongly against the grantor.

Restatement of Law of Property, 1 Appendix page 16;
Wood v. Paul, 250 Pa. 503;

Hays' Estate v. Commissioner, *supra*, in which the court said:

"All such grants are taken most strongly against the grantor."

In passing, it should be noted that in *Chater v. Carter*, 283 U. S. 573, cited by respondent (Br. 8, 37) and criticised in the note to 11 A. L. R. 2d 683, referred to above at page 25, the principal of a Hawaiian trust was to be paid to the beneficiary on January 1, 1913 "if she shall then be living." It is obvious that the beneficiary's interest was expressly conditioned upon survivorship and, it is submitted, that premature death of the beneficiary would result in a failure of the trust, whether it was inter vivos or testamentary.

That the prevailing rule is one of vesting under facts such as those in the instant case is shown not only in Section 257d of the Restatement of the Law of Property, hereinabove referred to on page 26, but is set forth with even greater particularity in Section 128c of the *Restatement of the Law of Trusts*, as follows:

"c. *Where principal is to be conveyed to beneficiaries in trustee's discretion.* Where property is transferred in trust to pay the income to a designated person and to convey the principal to him whenever the trustee in his discretion deems it wise to do so, it is a question of interpretation whether the designated person is given the whole beneficial interest, or only an interest in the income and an interest in the principal contingent on the exercise by the trustee of the power to convey the principal to him during his lifetime. *If there is no gift over of the principal,*

the inference is that the beneficiary has the whole beneficial interest, and if he dies before the trustee transfers the property to him, the trustee can be compelled to transfer it on his death to his estate." (Italics supplied.)

IV

There is additional support in the trust instruments for the application of the New York law favoring vesting.

It is the main burden of Point II of the respondent's brief that the usual rules of construction in New York do not apply to inter vivos trusts. As hereinabove pointed out, there is no basis for any such distinction in the New York cases and, in fact, the New York Courts have gone to the same lengths in discerning vested interests in both types of trusts under the basic rule in New York that the vesting of future interests is to be favored.

As shown in the petitioner's brief, the case at bar is a strong case for the application of the well established New York rule favoring vesting, because of the combined elements of a specific and segregated fund, a gift of the income and principal with only the payment deferred, and no words of survivorship or gift-over. However, in addition to the force of these basic elements calling for the application of the generic rule, there are other aspects of the trust instruments that more reasonably reflect an intention of the grantor to give all to the children than an intention to reserve the remainder in the unlikely event of the demise of a child before the grantor.

In the first place, each instrument provides that "I, Morris Lober * * * do hereby sell, assign, transfer and deliver unto myself, as Trustee, for my son * * *." In other words, he states in each instance that he is transferring the assets of the trust for the named child. This is more consistent with the intention that the decedent was completely

disposing of the property for the benefit of the child than an intention to reserve any interest therein.

In the second place, the reservation of the power to accelerate distribution of principal reflects an intention to be even more generous with the child than requiring him to await the attainment of age 25. Perhaps, the decedent had in mind the possible exercise of the power upon the marriage of the child or his establishment of a business. Isn't it unlikely that the defendant intended a reservation to himself—if he thought at all about the possible predecease of the child before the early age of 25—when he expressly placed himself in the position to make earlier disposition to the child.

In the third place, he directed that no part of the income should be used for the maintenance, education and support of the child, and in the second and third trusts, added the explanation, "but that the donor shall continue to discharge his obligations to his minor son (daughter) from his own personal funds." In the absence of this direction, the income would have been subject to application by the grantor for the child's maintenance and education, under the other provisions of the instrument permitting distribution or accumulation of income, thereby relieving the grantor of such expense, and, to that extent, would diminish the accumulation of income available to the child at 21. The only reasonable inference that can be drawn from this is that the grantor wanted to give the child the full measure of the property, unimpaired by any expenditures for his support and education. This provision in the trust instruments, prohibiting the use of income for the infant's support and education, is a variance from the usual trust provisions for children, under which the income may, and ordinarily is intended to, be used for such purposes.

Therefore, it is submitted that, even if the New York rules of construction did not apply generally to inter vivos trusts, which clearly is not the case, the foregoing provisions in the trust instruments, together with the element

making up a strong basic pattern for vesting under the applicable New York rule, furnish a far more reasonable and independent basis for judicial ascertainment of intention to vest than one of reversion.

In conclusion, it is submitted that the respondent's contentions, and the authorities offered in support thereof, do not survive examination. The interests of the beneficiaries in the income and principal of the trusts were indefeasibly vested, and common sense and an unbroken line of tax decisions dictate against an unprecedented extension of the rule in the *Holmes* case to such vested interests.

Respectfully submitted,

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The test applied by this Court was not whether the beneficiaries took vested interests, but whether the grantor could by the exercise of the power affect the enjoyment of the beneficiaries, the term "enjoyment" being used as connoting (p. 486) "present economic benefit rather than technical vesting of title or estates."

Petitioners contend that the *Holmes* case is not controlling here, since in that case the beneficiaries had conditional interests[3] and the power reserved by the grantor was a power to remove a condition upon which the beneficiary's interest was based, whereas in the instant case each beneficiary involved had a vested interest which the decedent could not cut off by the exercise of such power. The court below, however, held that even assuming that under the law of New York each beneficiary had a vested interest,[4] the power reserved by the decedent came within the terms of the statute. In this connection, it stated (R. 31-32):

> But for the practical purpose of determining whether the creator of a trust has retained enough of the incidents of ownership or control to make it probable that Congress intended to tax the trust *res* as a part of his estate, such an identification lacks reality. A father who has

[3] Cf., however, the *Holmes* case (p. 486) where this Court stated that each of the beneficiaries may have been invested with a "fee simple" in an equitable interest, subject to divestment by the contingency of the beneficiary's death during continuance of the trust.

[4] "Vested," was used by the court in the sense that upon his death the right to the principal would have passed to his estate rather than returning to the settlor.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 595

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Claims (R. 29-33) are reported in 108 F. Supp. 731.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1952 (R. 36). A timely motion for rehearing was overruled on February 3, 1953 (R. 36). The petition for a writ of certiorari

was filed on April 1, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Morris Lober, now deceased, created three trusts, one for each of his minor children, each trust instrument providing that the donor, as trustee, should collect the income and in his discretion accumulate it in whole or in part, such accumulations to be paid over to each beneficiary when he should reach his majority, the principal to be paid to such beneficiary upon his reaching the age of 25 years. The donor reserved the power in his discretion to make payments to the beneficiary from the principal of the trust at any time. The question presented is whether the value of the corpus of these three trusts was properly includible in the decedent's gross estate under the provisions of Section 811(d)(2) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the statute and Regulations involved are set forth in the Appendix, *infra*, pp. 14-17.

STATEMENT

The special findings of fact of the Court of Claims (R. 33-35) may be summarized as follows:

Petitioners are the executors of the estate of Morris Lober, a resident of New York, who died on December 13, 1942 (R. 33).

On October 31, 1924, Morris Lober, created a trust for the benefit of his son, Robert T. Lober

(R. 33). The trust instrument provided for the transfer by the donor to himself, as trustee, of certain property in trust to hold, invest and reinvest the same and to collect and receive the income thereof during the life of Robert T. Lober, or until he should reach the age of 25 years, the net income so collected to be never at any time either in whole or in part expended for the maintenance, education, and support of Robert T. Lober during his minority, but accumulated for his benefit in whole or in part, as the trustee might deem proper, such accumulations of income, if any, to be paid over to Robert T. Lober upon his reaching his majority, the principal of the trust estate or the remaining portion thereof to be paid over to him upon his reaching the age of 25 years. (R. 5-6, 33-34)

The trustee in his discretion might make payments to Robert T. Lober from the principal of the trust estate, the amount and time of such payments to rest in the discretion of the trustee, and any and all of the sums so paid were to be entirely free from the trust and to be the absolute property of the payee (R. 6, 33-34).

The instrument further provided, after giving the trustee general control over investments, that in case of the donor's death before the son reached the age of 25 years, the wife of the donor should be appointed trustee with the same powers and rights as those conferred upon the donor, as trustee (R. 7).

On March 15, 1929, decedent created a separate trust for the benefit of his son, James Morris Lober, and on March 18, 1929, a separate trust for the benefit of his daughter, Maxine Lober. The provisions of these two trust instruments were almost identical with those of the trust for the benefit of Robert T. Lober. (R. 33-34.)

In the estate tax return of the decedent, the value of these three trusts was not included as part of his gross estate. The Commissioner of Internal Revenue determined a deficiency in estate tax, resulting in part from the inclusion in the estate of the decedent of all the assets of the three trusts above mentioned. The deficiency, together with interest, was duly paid, a timely claim for refund filed, and this suit brought in the Court of Claims within two years from the rejection of such claim. (R. 34-35.) The Court of Claims, upon the foregoing findings of fact, held that petitioners were not entitled to recover, and dismissed the petition (R. 35).

ARGUMENT

1. The decision of the court below that the Commissioner of Internal Revenue properly included the value of these three trusts in the decedent's gross estate under the provisions of Section 811 (d) (2), *infra*,[1] is correct and in accord with the deci-

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[1] Section 811(d)(1) refers to transfers made after June 22, 1936, where the decedent reserves the power to alter, amend, revoke or terminate and (d)(2), the section here applicable, refers to transfers made on or prior to June 22, 1936, where the power was to alter, amend or revoke. In view, however, of this Court's holding in the *Holmes* case, 326 U.S. 480, that the addi-

sion of this Court in *Commissioner* v. *Estate of Holmes*, 326 U. S. 480.

The powers reserved by the grantor in this case with respect to accumulating the income and the power to terminate any of the trust agreements by paying over the principal to the respective beneficiaries, are almost identical with those reserved in the *Holmes* case, *supra*. The only difference is that in the *Holmes* case, in the event of the death of a beneficiary before the expiration of the 15-year period when the trust would otherwise terminate, the principal was to go to each beneficiary's issue or failing such issue to the other sons or their issue, the trust being for the benefit of the three sons.[4] In the instant case, the principal of each trust was to be paid over to the named beneficiary upon his reaching the age of 25 years, but no provision was made in the trust instrument as to who should take in the event of the death of such beneficiary prior to the termination of the trust.[4] This Court, in the *Holmes* case, held that the power to pay over the principal and thus, in effect, terminate the trust, coupled with the power to accumulate income, was a power within the meaning of Section 811(d).

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tion of the word "terminate" was merely declaratory of existing law, the same considerations govern in both instances and it is immaterial whether subsection (1) or (2) is involved. No distinction is therefore made in the discussion of cases involving these two subsections.

[4] The fact that there was a spendthrift provision in the *Holmes* trust and not in this, as petitioners point out, is immaterial in view of the provisions of Section 15 of the Personal Property Law of New York, discussed *infra*, pp. 7-8, 10-11.

the power to decide that his son should have certain assets to use, enjoy, spend, waste or invest, or to decide that he shall not have them at all for any of these purposes, but that his creditors, his children, wife, or collateral relatives should have them, has a significant control over the assets. We think it is substantially the kind of control which the Supreme Court was dealing with in *Commissioner* v. *Holmes*.

It is clear that here, just as in the *Holmes* case, more than mere acceleration of payment is involved. The exercise of the power reserved by the grantor would enable a particular beneficiary to have present enjoyment of both the accumulated income and principal of the property, since, if he should die before the termination of the trust, his heirs, devisees, or creditors would enjoy it and he himself would have no actual enjoyment of it, as that term is used in the *Holmes* case.

Moreover, even though a beneficiary here had a vested interest in the sense that if he had died before the grantor, the trust *res* would have descended to his heirs at law or assigns, he had no right under the law of New York to require payment of income or principal except under the terms of the trust (*Brandt* v. *Continental Bank & Trust Co.*, 43 N.Y.S. 2d 255) and no right to alienate his interest therein. (40 McKinney's Consolidated Laws of New York, Personal Property Law, Sec. 15, p. 127).[5]

[5] That section provides, "The right of the beneficiary to enforce the performance of a trust to receive the income of

Petitioners assert that the decision of the court below is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Hoge' Estate* v. *Commissioner*, 183 F. 2d 169. In the *Hoge* case, which was based primarily on a construction of the statutory law of the State of Mississippi, the court of appeals held that under Mississippi law if any beneficiary had died during the existence of the trust his heirs would have taken by operation of law. On this premise, the court concluded that the beneficiaries had vested interests, the right of enjoyment of which could not be changed by the exercise of the reserved power; that the case was not governed by the *Holmes* decision; and that the power reserved by the grantor, as trustee, to terminate the trust by paying over the principal to one of the named beneficiaries was not, therefore, a power within the meaning of Section 811 (d)(1). We believe that the decision of the Fifth Circuit in the *Hoge* case is erroneous,* just as was its prior decision on the reserved-power issue in *Commissioner*

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personal property, and to apply it to the use of any person, can not be transferred by assignment or otherwise." This has been held applicable where the trust is to apply the income to the use of the beneficiary himself. *Matter of Unprich*, 301 N. Y. 415, 419. See also *In Re Sanford's Estate*, 262 N.Y.S. 491-495.

* For instance, as intervening in conclusion in part, the court stressed the fact that the powers to distribute or accumulate income and to terminate the trust were granted to the decedent (the settlor) as trustee. However, Section 811(d)(1) refers to a power "in whatever capacity exercisable" and this has been held as declarative of existing law and applicable to

v. *Estate of Holmes*, 148 F. 2d 740, reversed by this Court, 326 U. S. 480.

None of the cases cited by petitioners (Br. 14-15) supports the proposition that this Court's decision in the *Holmes* case (Br. 14) "has been interpreted as meaning that Section 811(d) is applicable only to powers over conditional interests." In every one of those cases the power was held sufficient to come within the provisions of Section 811(d) and any language upon which petitioners depend to support their position, even if such a construction is permissible, was mere *dicta*. On the other hand, the decision of the court below is supported by the decisions in *Melton* v. *Driscoll*, 117 F. 2d 477 (C.A. 3), certiorari denied, 313 U. S. 579; *Commissioner* v. *Roger's Estate*, 173 F. 2d 613 (C.A. 3), petition for certiorari dismissed per stipulation, 337 U. S. 937; *Commissioner* v. *Newbold's Estate*, 155 F. 2d 694 (C.A. 2); *Hobbizelle* v. *United States*, 3 F. Supp. 331 (C. Cls.); and *Inman* v. *Commissioner*, 18 T. C. 522, reversed on other grounds by the Court of Appeals for the Second Circuit, decided April 6, 1959 (1959 P-H, par. 172,563).[7] In the last case,

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powers under Section 811(d)(2); *Welch* v. *Terhune*, 126 F. 2d 833 (C.A. 1); *Baker Trust Co. of Pittsburgh* v. *Driscoll*, 138 F. 2d 152 (C.A. 3); cf. *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, 486-487.

[7] The only question raised by the appeal related to the valuation of the life estates during the time the beneficiaries were absolutely entitled to the income. The Court of Appeals, in effect, sustained the Tax Court's conclusion as to its construction of Section 811(d), with respect to the inclusion in the gross estate of the value of the remainder interests. In that

the Tax Court held that Section 811(d) applied (p. 536) "even though termination would result only in the acceleration of the nephews' interests as remaindermen because the nephews' enjoyment of the principal is thereby made certain." In the *Hagert* case, *supra*, a power reserved by the grantor, as trustee, was held to be a power to alter or amend within Section 811(d) where he could accumulate income and allocate gains from the sale of trust stock to either income or corpus, but had no power to defeat the interests of the remaindermen in the original trust corpus. In the *Mellon* case, *supra*, the court held that Section 811(d) required the inclusion in the gross estate of property which was to be held for the benefit of grantor's two minor children, giving them the income for life with power to appoint by will, but the grantor reserved the power to revoke, whereupon the principal was to be distributed to the three children, the life beneficiaries. Cf. also the *Hobbitzelle* case, *supra*, where the Court of Claims stated that a power reserved by a grantor to direct unequal distribution of trust income between her two daughters (life beneficiaries) was (p. 334) an "important and substantial" power.

In the court below, the Government took the position that under the laws of the State of New York

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case the principal was to be divided into three parts, and the income from each part to be paid to one of three nephews for a term of years or until his death and the trust could be terminated by the joint action of all three trustees (the nephews), except that during the lifetime of the grantor his consent had to be obtained. This was the *only* power reserved by the grantor.

these beneficiaries did not have vested interests in the sense in which that term is used in the *Hoge* opinion. The court below, however, found it unnecessary to decide the point. If our contention on this point is sound, even the apparent conflict between the decision of the court below and the *Hoge* case disappears. In the case at bar, the trust instruments expressly give the beneficiaries only life estates until they have reached the age of 25 years. Under the general law of trusts, in the event of the death of a beneficiary prior to the termination of the trust with no provision being made in the instrument for the devolution of the property, it reverts to the grantor or is held in trust for his benefit. *Chater* v. *Carter*, 283 U. S. 572; *Doctor* v. *Hughes*, 225 N. Y. 305; *Newton* v. *Hunt*, 201 N. Y. 509; Restatement, Trusts (1935), Sec. 411; cf. concurring opinion of Mr. Justice Reed in the case of *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 685.* In such circumstances, the corpus of the trusts would be clearly includible in the decedent's gross estate under the *Holmes* decision, since if the property might have reverted to the grantor the exercise of the power involved would have conferred a "substantial present economic benefit" on the beneficiary which he might not otherwise have enjoyed.

2. The other contentions of petitioners are without substance. Whether, if one of the beneficiaries

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*This concurring opinion and his dissenting opinion in *Commissioner* v. *Estate of Church*, 335 U. S. 632, are reported together, beginning on page 651.

had died before the decedent, an estate tax would have been due on his estate depends, of course, upon the law of New York. Even if, under that law, such a tax would be due, it does not preclude the tax on the grantor's estate if he dies first. A similar situation may arise where a transfer is made in contemplation of death and the donee dies before the grantor and also possibly in cases where property is taxable under a power of appointment under Section 811(f) of the Internal Revenue Code. Neither is the fact that the making of these gifts subjected the donor to gift tax liability of any consequence. There is no showing in this case that any gift tax was actually paid on the trust created for Robert T. Lober in 1924. The other two trusts were created in 1923 when there was no gift tax liability. This Court held in the case of *Smith* v. *Shaughnessy*, 318 U. S. 176, 179, that the gift and estate taxes are not always mutually exclusive and that a gift tax is in effect in some instances a security, "a form of down-payment on the estate tax which secures the eventual payment of the latter; * * *." It recognized there that under certain circumstances the same transaction may be subject to both a gift and estate tax. Petitioners' contention that trusts involving the question of Section 811(d) powers are an exception to this general principle (Br. 19-20) is not convincing.

The further contention that Section 811(d) does not apply in this case, since the transfers here were not testamentary in character, is also without merit. Congress has provided that if a donor reserves any

of the powers designated in Section 811(d) in a transfer of property, the transfer is "deemed" to be a substitute for a testamentary disposition. Cf. *Helvering* v. *City Bank Co.*, 296 U. S. 85, 92. Under the statute, the property is includible in the decedent's gross estate if the reserved power comes within the provisions of Section 811(d). That is all that is required.

CONCLUSION

The decision of the court below is clearly correct, and further review is not warranted. The petition for a writ of certiorari should be denied.

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MAY, 1953.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated except real property situated outside of the United States—

* * * * * *

(d) *Revocable Transfers*—

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the en-

joyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

* * * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1928, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addi-

tion is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

(b) *Taxability.*—The property or any interest therein transferred as described in subsection (a) shall be included in the gross estate if it comes within any one of the following paragraphs:

* * * * *

(2) If the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1926 became effective (June 23, 1926), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 39

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions of the Court of Claims (R. 29-33) are reported in 108 F. Supp. 731.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1952 (R. 36). On December 31, 1952, the petitioners filed a motion for rehearing which was overruled on February 3, 1953 (R. 36). The petition for a writ of certiorari was filed on April 1, 1953, and was granted

on June 1, 1953 (R. 37). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Decedent created three trusts, one for each of his minor children, each trust instrument providing that the decedent, as trustee, should collect the income and in his discretion accumulate it in whole or in part, such accumulations to be paid over to the beneficiary when he reached his majority, the principal to be paid to such beneficiary when he reached the age of 25 years. The decedent reserved the power in his discretion to make payments to the beneficiary from the principal of the trust estate at any time. The question presented is whether the value of the assets of these three trusts is includible in decedent's gross estate under the provisions of Section 811 (d) (2) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the statute and regulations are set forth in the Appendix, *infra*, pp. 47–50.

STATEMENT

The petitioners are executors of the last will and testament of Morris Lober, who died a resident of the State of New York on December 13, 1932 (R. 33).

The decedent, on October 31, 1924, created a trust for the benefit of his son, Robert T. Lober

(R. 33). The trust instrument provided for the transfer by the donor to himself, as trustee, of certain property in trust to hold, invest and reinvest the same and to collect and receive the income thereof during the life of Robert T. Lober, or until he should reach the age of 25 years, the net income so collected to be never at any time either in whole or in part expended for the maintenance, education and support of Robert T. Lober during his minority, but to be accumulated for his benefit in whole or in part, as the trustee might deem proper, such accumulations of income, if any, to be paid over to Robert T. Lober upon his reaching his majority. The principal of the trust estate or the remaining portion thereof was to be paid over to Robert T. Lober when he reached the age of 25 years (R. 5-6).

The trustee in his discretion could make payments to Robert T. Lober from the principal of the trust estate, the amount and time of such payments to rest in the discretion of the trustee, and any and all of the sums so paid were to be entirely freed from the trust and to be the absolute property of the payee (R. 6).

The instrument further provided, after giving the trustee general control over investments, that in case of the donor's death before the son reached the age of 25 years, the wife of the donor should be appointed trustee with the same powers and rights as conferred upon the donor as trustee (R. 7).

On March 15, 1929, decedent created a separate trust for the benefit of his son, James Morris Lober, and on March 18, 1929, another trust for the benefit of his daughter, Maxine Lober. The provisions of these two trust instruments were substantially identical with those of the trust for the benefit of Robert T. Lober (R. 33–34).

In the estate tax return of the decedent, the value of these three trusts was not included as part of decedent's gross estate. The Commissioner of Internal Revenue determined a deficiency in estate tax, resulting in part from the inclusion in the estate of decedent of all the assets of the three trusts above mentioned. The deficiency, together with interest, was duly paid, a timely claim for refund was filed, and this suit was brought in the Court of Claims within two years from the rejection of the claim (R. 34–35).

The Court of Claims, upon the foregoing findings of fact, held that the petitioners were not entitled to recover, and dismissed the petition (R. 35).

SUMMARY OF ARGUMENT

As the court below held, this case is controlled by *Commissioner* v. *Estate of Holmes*, 326 U. S. 480. Here, as in *Holmes*, the decedent's power to confer upon the beneficiaries, by terminating the trust, present enjoyment of assets they might otherwise never enjoy was clearly within the provision of Section 811 (d) (2) which taxes all

transferred assets in the "enjoyment" of which the decedent had power to effect "any change".

I

1. Even on petitioners' assumption, in our view erroneous, that the interests of the beneficiaries were indefeasibly vested, the rule in *Holmes* applies. As this Court there affirmed, the words "'enjoyment' and 'enjoy,' as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates." 326 U. S. at 486. The critical fact, then, is that the decedent retained the power to confer upon the beneficiaries either "substantial present economic benefit" or no present benefit at all.

The assumption that the beneficiaries' interests were "indefeasibly vested" means merely that, had they died during the term of the trust, the property would have passed through their estates. But, as shown by the decision in *Mellon v. Driscoll*, 117 F. 2d 477 (C. A. 3), certiorari denied, 313 U. S. 579 (which, conflicting with the Fifth Circuit's decision in *Holmes*, was a basis for certiorari, and was cited by this Court with approval, in that case), the power to pass property at death differs sharply from the power to use, expend, or otherwise enjoy the property during life.

2. There is no basis for escaping the tax in petitioners' argument that the decedent had power to effect a "mere acceleration of the time of enjoyment * * *." In this case, as in most imaginable cases, the power "merely" to accelerate was unmistakably sufficient to make the difference between enjoyment and the distinct possibility of no enjoyment. And so the sweeping language of Congress, covering powers to make "any change" in enjoyment, plainly includes the power retained by the decedent.

3. Equally unavailing to petitioners is the contention that the transfers in this case were "complete" when made. For it is clear that Section 811 (d), like subsections (c) and (e), reaches completed transfers. Thus, although transfers subject to a power of revocation exercisable jointly by the settlor and a person having an adverse interest are completed gifts (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339), they are nevertheless taxable under Section 811 (d). *Helvering* v. *City Bank Co.*, 296 U. S. 85. For when Congress used powers of revocation exercisable in conjunction with "any person" it meant nothing less. Similarly, the statutory reference to "any change" in "enjoyment" plainly includes the substantial changes the decedent in this case retained power to effect.

It is, then, no bar to the estate tax that transfers of the type involved here might be subject to the gift tax when made. Recognizing that the

two taxes are not mutually exclusive, Congress provided specifically in Section 813 of the Code for the crediting of gift tax payments against the estate tax. Far from precluding the estate tax, the gift tax simply "amounts in some instances to a security, a form of down-payment on the estate tax which secures the eventual payment of the latter." * * *" *Smith v. Shaughnessy*, 318 U. S. 176, 179.

4. There is no substance in the argument (Pet. Br. 8, 20) that the decision below would require taxation in a decedent's estate of a gift he had made to his minor child with himself as guardian. It may be noted that the argument assumes the decedent to have done a meaningless thing when he created his trusts and reserved the power to change them to the arrangement petitioners contend is no different. But the decedent's plan made sense; guardianship would have been a much different, far more limited role than that he retained. As guardian, he would have been sharply restricted in the investments he could make, not completely unfettered as he was under the trusts. As guardian, subject to close and continuing judicial supervision, he would have had far less power than he reserved as trustee to turn the assets over to the children for investment or consumption. And as guardian, he would have lost control over the property when the children reached majority, whereas he retained such control under the trusts until the children reached 25.

significant that the trusts here were older when they were created shortly after the beneficiaries were born, that they postponed to the future settlement of the beneficiaries to the payments of either principal or interest, that neither retained, as trustee, practically unlimited power to control and invest the property, and to determine in his discretion when or if the children were ready. (Unless the trust terminated) to control the property themselves. In these circumstances, it makes no sense to say that the settlor would have wished the property to pass to the intestate distributees of a deceased child or by the will of a child to the end that the settlor endure enough to have control of the property. It is far more reasonable to assume that the settlor would have wished the property to return to him if a child died before receiving it.

This conclusion, applied to the particular terms of the trusts involved here, is supported by the very fact that some publishers cite *Second Church Trust Co. v. Chase National Bank*, 121 Misc. 45, 201, affirmed without opinion, 209 App. Div. 799, affirmed without opinion, 239 N. Y. 526. It accords with the general view that it is always reasonable to assume trust property to be safer there than to have it go to the heirs of the beneficiary." Mr. Justice Reed, concurring in *Spiegel* v. *Commissioner*, 335 U. S. 701, and dissenting in *Commissioner* v. *Church*, 335 U. S.

[redacted]

The same reasoning requiring a contrary construction as to the trust principal applies to the accumulations.

3. It is clear, in any event, that petitioners have failed to demonstrate that New York law provides the ground they invoke for attacking the Commissioner's assessment. *Cf. Helvering v. Fitch*, 309 U. S. 149, 156. They are left with no basis for even the attempt to distinguish *Commissioner v. Estate of Holmes*.

Statutes

Section 811 (d) of the Internal Revenue Code (Appendix, *infra*, pp. 47–48) requires the inclusion in a decedent's gross estate of all property "[t]o the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke . . . ." In *Commissioner v. Estate of Holmes*, 326 U. S. 480, the decedent had created three irrevocable trusts for his three sons, giving each the beneficial interest in one-third of a common trust. The trusts were to continue for 10 years unless terminated earlier by the settlor, and each of the sons, if living, was to receive the corpus of his trust on termination. The shares of any deceased son were to be paid to his issue, and on failure of issue to the other two sons or their surviving issue. The income of each trust, subject to spendthrift provisions and discretionary power of accumulation, was to be dis-

tributed to the beneficiary if not accumulated. The settlor, who was named and acted as trustee until his death, reserved to himself during his lifetime the power to terminate the trusts and to distribute the principal with accumulated income to the beneficiaries then entitled to receive it. This Court held that the interests the decedent had transferred remained subject at his death to a change in enjoyment through exercise of his power to terminate and distribute the corpus to the beneficiaries, and that the trust assets were accordingly taxable as part of the decedent's estate.

That holding, we submit, applies squarely to the substantially similar facts presented here. Petitioners contend (Br. 7, 15) that under New York law the interests of the beneficiaries in this case were "unconditionally vested"—*i. e.*, that the interest of any beneficiary dying during the term of the trust would have passed to his estate—and that this factor requires a result different from *Helvering*, where the trusts provided for gifts over. The court below, assuming, without deciding, that the taxpayers were correct in their view of New York law (R. 31), held that the proposed distinction made no difference. It said (R. 32):

> * * * A father who has the power to decide that his son should have certain assets to use, enjoy, spend, waste or invest, or to decide that he shall not have them at all for any of these purposes, but that his

> creditors, his children, wife, or collateral relatives should have them, has a significant control over the assets. We think it is substantially the kind of control which the Supreme Court was dealing with in *Commissioner v. Holmes*.

We contend, as the first point of our argument, that the Court of Claims was right in this conclusion.

Secondly, however, we shall show that even if petitioners' attempted distinction of *Holmes* were significant, the attempt has failed. Petitioners implicitly recognize (Br. 11–13, 15, 19), as they must, that if the interests of the beneficiaries of the trusts were *not* "unconditionally vested"—if, that is, upon the death of any beneficiary his interest would have returned to the settlor—this case duplicates *Holmes* in every conceivably material detail. They assert with confident brevity (Br. 11) that "It is established beyond any doubt under New York law * * * that the beneficiaries had unconditionally vested interests in the principal * * * and in any income accumulated during minority * * *" (citations omitted). But we think the terms of the *inter vivos* trusts involved here would require a contrary conclusion under New York law. At the very least, petitioners have failed to sustain their burden of establishing the asserted rule of state law upon which they seek to upset the Commissioner's assessment.

I

THE DECEDENT'S RESERVED POWER TO ACCUMULATE INCOME AND TO TERMINATE THE TRUSTS BY DISTRIBUTING THE PRINCIPAL TO THE BENEFICIARIES AT ANY TIME WAS A POWER TO CHANGE THE ENJOYMENT OF THE INTERESTS HE HAD TRANSFERRED, REQUIRING INCLUSION OF THE TRUST ASSETS IN HIS GROSS ESTATE

Holding taxable in the estate of the settlor-trustee the trust assets involved in *Commissioner v. Estate of Holmes*, 326 U. S. 480, this Court said (326 U. S. at 487):

> It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which

§ 811 (d) (2) requires in order to avoid the tax.

That conclusion fits this case.'

Here, as in *Holmes*, the three trusts reserved to the settlor the power to accumulate income—in this case, until the beneficiaries reached the age of 21, which none had at the time of the settlor's death. Here, similarly, reserving the power to make distributions of principal to the beneficiaries, the trustee could terminate the trusts at any time by such distributions. Here, in short, as in *Holmes*, because a beneficiary might die before the period of the trust had ended, the settlor's reserved power to terminate was a power "to make certain that a beneficiary [would] have [the right of enjoyment] who [might] never come into it if the power [was] not exercised * * *."

The single distinction upon which petitioners would base the different result for which they contend is that here the particular persons who

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[1] The rule of *Commissioner* v. *Estate of Holmes* has been applied to impose taxes on the estates of decedents who, in a variety of ways fundamentally similar to the devices involved here, have retained over properties transferred in trust a power to change the right of enjoyment created by the transfer. See, *e. g.*, *Hurd* v. *Commissioner*, 160 F. 2d 610 (C. A. 1); *Thorp's Estate* v. *Commissioner*, 164 F. 2d 966 (C. A. 3), certiorari denied, 333 U. S. 843; *Commissioner* v. *Newbold's Estate*, 158 F. 2d 694 (C. A. 2); *Loughridge's Estate* v. *Commissioner*, 183 F. 2d 294 (C. A. 10), certiorari denied, 340 U. S. 830; *Hauptfuhrer's Estate* v. *Commissioner*, 195 F. 2d 543 (C. A. 3), certiorari denied, 344 U. S. 825.

would take the property in the event of the death of the named beneficiary were not designated in the trust instrument, whereas the trusts in *Holmes* provided for gifts over to the surviving issue of a named beneficiary or to the other beneficiaries or their issue. Arguing that the beneficiaries in this case had inheritable estates under New York law and that each beneficiary's heirs are "carried within the beneficiary during his lifetime" (Pet. Br. 15), they claim that the power reserved by the settlor here cannot be viewed as a power to change enjoyment within the meaning of Section 811 (d) (2).* Assuming for the moment that petitioners correctly state the law of New York (but see pp. 32-45, *infra*), their conclusion is nevertheless erroneous.

1. It was settled in *Commissioner* v. *Estate of Holmes* that a power, like the one reserved by the

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*There are no express spendthrift provisions in the trusts involved here as there were in *Holmes*, but this fact is immaterial, and petitioners, while mentioning it (Br. 7), properly refrain from placing any special reliance on it. For under New York law, the trusts amounted to spendthrift trusts. Section 15 of New York's Personal Property Law (McKinney's Consol. Laws of N. Y., Bk. 40) provides:

> The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise.

This provision "in effect make[s] every trust in New York a spendthrift trust so far as life interests are concerned, where the beneficiary has not created the trust for his own benefit." Griswold, *Spendthrift Trusts* (2d ed., 1947), p. 241. See, *e. g.*, *Matter of Ungrich*, 201 N. Y. 415.

If, as we argue below, the beneficiaries in this case had no inheritable estate, the *Hoys* case is distinguishable on this ground. Apart from this distinction, however, we think the decision in *Hoys* is wrong, just as was the prior decision of the same court in *Holmes* (148 F. 2d 740), which was reversed by this Court. For the reasons stated above, we believe the Fifth Circuit, merely mentioning the *Holmes* decision as an authority invoked by the Government, misconceived the definition of "enjoyment" established by that authority, a definition which should have been controlling in *Hoys* as it is here.

II

IN ANY EVENT, THE INTERESTS OF THE BENEFICIARIES WERE NOT INDEFEASIBLY VESTED, SO THE SINGLE GROUND ON WHICH PETITIONERS ATTEMPT TO DISTINGUISH THE HOLMES DECISION DOES NOT EXIST

Our argument preceding this point assumes with petitioners, as did the court below, that the decedent's children had indefeasibly vested interests in the corpus and accumulated income of the trusts. This assumption constitutes the sole basis on which petitioners attempt, unsuccesfully in our view, to distinguish the *Holmes* case. But even this attempt is groundless if, as we argue here, the interests of the beneficiaries were not indefeasibly vested.

1. From the New York cases on which petitioners base their laconic assertion (Br. 11) that the interests of the beneficiaries were "beyond

any doubt * * * unconditionally vested," only one thing is clear beyond doubt—namely, that whether there was such unconditional vesting turns on the intention of the settlor, which is to be gleaned from the terms of the trust instruments and the surrounding circumstances. Realistically stated, the problem here is to determine what the settlor would have said, had he said anything, as to the disposition of the trust assets if the beneficiaries died before they became entitled to receive them.

Briefly summarized, the relevant terms and circumstances of the trusts were these: Each trust was created very shortly after the birth of the child named as beneficiary. The settlor, naming himself as trustee, retained the unlimited powers he had had before the transfers to control, invest, and reinvest the properties for the ultimate benefit of his children if they survived. He was "to collect and receive the income" of the trust, accumulating it in his discretion, "such accumulations of income, if any, *to be paid over to* [the beneficiary] *upon his reaching his majority*, the principal of said Trust Estate or the remaining portion thereof *to be paid over* to the [beneficiary] *when he shall have reached the age of twenty-five years*" (R. 5–6, emphasis added). Until the time which the terms of the trust provided for "payment over," the beneficiary had no right to either principal or income, a fact emphasized by the provision that payments of principal, in the discretion of the trustee, "shall be entirely freed

decedent in this case, to terminate by distributing the trust principal to the current beneficiaries is a power "to alter, amend, or revoke" within the meaning of Section 811 (d) (2). Accordingly, decision here turns on the narrow question whether the decedent's power was one which would have effected "any change" in the "enjoyment" of the trust interests he had transferred. We think that this issue, too, must be resolved against petitioners on the authority of *Holmes*.

In the *Holmes* case, this Court reaffirmed the now settled principle "that 'enjoyment' and 'enjoy,' as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates." 326 U. S. at 486. Viewed in this light, it scarcely advances the inquiry here to insist, as petitioners do, that because their heirs were "carried within them" during their lifetime, the beneficiaries had full enjoyment of the trust properties which was not subject to "any change" by the decedent. For the fact is that throughout the period of the trust, and certainly at the time of his death, the decedent had plenary power to confer upon the beneficiaries either "substantial present economic benefit" or no present benefit at all.

Retaining unfettered powers as trustee to control, invest, and reinvest the property he had transferred in trust—and thus, in an important economic respect, retaining the powers that out-

right ownership had given him before the transfer—the settlor decedent also reserved the right to accumulate or distribute the trust income during the minority of the beneficiaries. (All three were still minors at his death.) In addition, while the beneficiaries were not to [1]receive the principal under the terms of the trust until they reached the age of 25, the settlor here, like the settlor in *Holmes*, reserved the power to distribute the principal to them at any time before then. In a word, the settlor possessed at the time of his death the same kind of power as that involved in *Holmes*—the power to give to the trust beneficiaries present enjoyment of all the trust assets, enjoyment they might otherwise never have known had they died during the term of the trust.

The assumption that the beneficiaries' interests were "indefeasibly vested" is, we think, substantially meaningless as a practical matter in the circumstances of this case, and cannot justify escape here from the estate tax imposed in *Holmes*. It is to be noted, first of all, that only one of the three beneficiaries in this case had reached the age of 18 when the decedent died (see R. 2, 26), so that only this one of the three had power to make a will.[1] For the first eighteen years of each trust—and as to two of the trusts at the time when the decedent died—the only

[1] N. Y. Decedent Estate Law, § 15 (McKinney's Consol. Laws of N. Y., Bk. 13).

significance of the assumption that the beneficiaries' interests were indefeasibly vested is that the persons who would take on their deaths were named in New York's law of intestate succession rather than in the trust instruments. In other words, at least while the beneficiaries were under 18 years old and unmarried, petitioners' argument would mean that the trust assets would have been taxable in the decedent's estate (under *Holmes*) had the trust provided for gifts over to the decedent and his wife upon a beneficiary's death, but that the tax may not be imposed here though the absence of a specific provision in the trusts made no difference in this respect since the same disposition of the trust assets would have been required under the New York Decedent Estate Law, § 83.

But going beyond the point when each of the beneficiaries would have reached the age of 18, petitioners err in assuming that, in terms of the substantial economic realities with which the estate tax is concerned, the power to pass property at death by will is the same as the present right to possess, use, and dispose of property during one's lifetime. Their view is refuted by *Mellon* v. *Driscoll*, 117 F. 2d 477 (C. A. 3), certiorari denied, 313 U. S. 579, a decision which seems particularly significant here since it was one of the cases forming the basis for certiorari in the *Holmes* case and was cited there with approval by this Court. See 326 U. S. at 483, n. 2, and 489,

n. 11. In the *Mellon* case, the decedent, who died in 1934, had created in 1917 spendthrift trusts for his two children,[1] with a trust company as trustee. The trustee in each instance was directed to pay the income to the child for life, and upon the child's death to distribute the principal and any undistributed income to such persons as the life beneficiary might designate by will. In the absence of such direction, the trustee was to distribute the property to those who would take as the life beneficiary's heirs under the intestacy laws of Pennsylvania. The decedent reserved the right to revoke each trust, whereupon the principal was to be distributed to the named child. In holding that the remainder interests were includible in the grantor's gross estate, the Third Circuit pointed out (p. 479) that the provision taxing interests in the "enjoyment" of which the decedent retained power to make "any change" (there Section 302 of the Revenue Act of 1926, c.

[1] The Court of Appeals in the *Mellon* opinion refers to the children as minors. The record in the case (No. 364, October Term, 1940) shows that one child was thirty and the other thirty-seven at the time the trusts were created. Under the trust instruments, there was no power in the trustee or the decedent to accumulate income, and an estate for the life of each beneficiary was excluded by the Commissioner from the decedent's estate. *Cf. Kahn v. United States*, 257 U. S. 244, 245; *In re Ipsen's Estate*, 295 F. 2d 479 (C. A. 2). Here, where the decedent possessed at the time of his death power to accumulate the income of all three trusts, petitioners make no claim that if the assets were taxable in the decedent's estate, some portion was excludible.

37, 44 Stat. 9, now Section 811 (d) (2) of the Internal Revenue Code) was so comprehensive as to include all powers other than those "affecting trivial and unimportant matters." * * *"[1]

Whatever technical differences there may be between the power to pass "indefeasibly vested" property rights at death and the power to convey such rights by will under an irrevocable general power of appointment, like that given to the beneficiary in the *Mellon* case, there are no dif-

[1] *See also Commissioner* v. *Hogle's Estate*, 170 F. 2d 913 (C. A. 8), petition for certiorari dismissed per stipulation of counsel, 337 U. S. 967. In that case the decedent, as trustee of five trusts created by him, had had the power to determine whether gains from sales of trust assets should be credited to corpus or income, power to pay out accumulated income in the sole discretion and to make determinations as corpus or income, but no power to encroach. The children and grandchildren named as beneficiaries were given the income and the power to appoint the remainder by will, with gifts over in default of appointment. The Court of Appeals held that the entire value of the trust assets was includible in the grantor's gross estate under Section 811 (d) (2) on the ground (p. 916) that the grantor had retained "a substantial power to shift or control the beneficial enjoyment of the income as between the life beneficiaries and the remaindermen, even though he could not shift it to himself or to the estate by exercising the power, completely eliminate the remainder interest." The case was additionally decided on the basis of [illegible] grounds, namely that the value of all transfers made [illegible] the creation of the trusts with respect to which the decedent had retained no power at death was includible in that it [illegible] the value of all accumulated income and realized gains and excluding the value of the original corpus.

between which matter lies? Indeed, clause 2(2) [illegible] of the Income Tax Act [illegible] such interest as being admissible for that purpose. The significant point here is that the [illegible] that property will pass at death [illegible] application of death is a palpably and substantially different thing from the present right to enjoy income or the use of the property. As the court below said (32 31-32):

"... The power of the widow to pay over the principal sum, or only the power to determine whether she should or should not have the property. As the [illegible] was not a mere question of [illegible] payment, of whether he should enjoy the property earlier or later, but whether he should enjoy it at all or not. The [illegible] fication of a living person with [illegible] in the [illegible] case of [illegible] type of [illegible] [illegible] [illegible] [illegible] [illegible] practical purposes [illegible] the testator or a [illegible]

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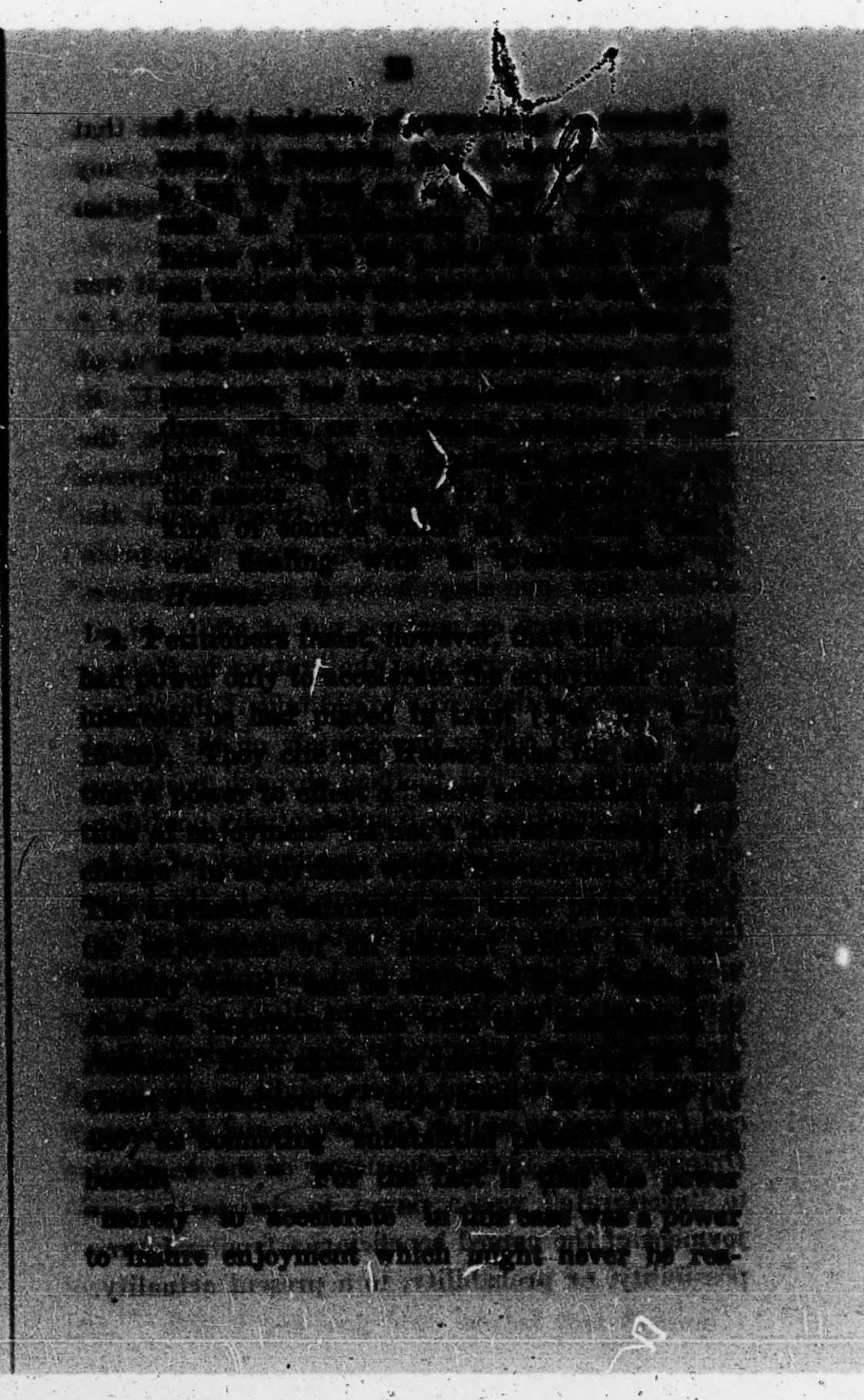
1 See *Thomson v. Provost* [illegible] 1 D.L.R. 1 [illegible] where the court held that a provision in a will [illegible] would constitute a declaration [illegible] ment for the beneficiary for a [illegible] should pass to the beneficiary [illegible] provision effected a change in [illegible] in substance in that it changes the method by which a child may direct the devolution of his share of the trust instead of changing the persons entitled to take eventually."...



[redacted]

Driscoll, supra, is that the power of the trustee to "accelerate" was a power to change the enjoyment of the named beneficiaries from a future possibility, or probability, to a present actuality.

[redacted]

(Br. 17) that powers which "are not sufficient to render the gift incomplete, * * * are likewise insufficient for estate taxation under Section 811 '(d).." But it has long been settled that Section

[redacted]

[redacted]

[redacted]

[redacted]

to judicial supervision and a duty to account, the decedent would have acted under restrictions designed to preserve the world's ethics, prompting from trustee to, and not to the minor of his property. As trustee, viewing the situation in practical terms, the decedent was free to have over both income and accumulated principal for all the modern cars and trips abroad that late adolescent desire and parental indulgence might dictate. Or, as his trusts carefully provided, the decedent could withhold any of these rights of enjoyment. Cf. *Stifel v. Commissioner*, 127 F. 2d 107 (C. A. 2).

As guardian, moreover, the decedent would have lost altogether his hold over the trust assets when the children reached majority. But as trustee he retained the power to withhold the principal from them until they reached 25. It is scarcely realistic to suggest that a change from a right to the custody of property to unfettered control and use of the property represents no change in enjoyment.

There are, in short, vital differences between guardianship and the broad powers the decedent

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of N. Y., Sec. 14, 1953 Supp.); *Delaplaine v. Barrett*, 270 N. Y. 38, 42, 43.

Of course, the decedent's status as father of the children would not in itself have entitled him to control and invest their property. *Foley v. Mutual Life Ins. Co.*, 148 N. Y. 236; *Matter of Waldberg*, 172 Misc. 104, 15 N. Y. S. 2d 203, 39 C. J. S. 110. Presumably, in the unlikely assertion of petitioners' hypothesis (gift by the father with father as guardian) the guardianship they suppose would result from a court order and subject the father to the usual restrictions on guardians.

retained in this case. The decisive point here is that the decedent at his death retained power to change substantially the enjoyment of the interests he had conveyed—the fact which requires inclusion of those interests in his estate in accordance with the plain terms and purpose of Section 811 (d) (2). Nothing in this conclusion suggests that in the far different situation of a guardian—strictly limited by judicial supervision in both the time and manner of his control—his estate would be taxable on the property of his ward.

5. The primary authority upon which petitioners rely for their view that the court below has erred is the decision of the Court of Appeals for the Fifth Circuit in *Hogg' Estate* v. *Commissioner*, 181 F. 2d 169. In that case the decedent had created a trust for the benefit of her four children, naming herself as trustee. The instrument provided that she should pay to the beneficiaries so much of the income as she deemed for their best interests and accumulate the remainder. She also reserved the power to terminate the trust in her discretion. Upon termination of the trust, either by death of the settlor or by her prior decision to terminate, the property was to go to the beneficiaries in equal shares or, in the event any of them were dead, to his heirs under the laws of descent or distribution of the State of Mississippi. The Tax Court (12 T. C. 210) held the property includible in the decedent's gross estate under the *Holmes* decision, pointing out (p. 215) that she had held during her life the

power through termination to make certain that the existing beneficiaries would come into the enjoyment of their shares of the trust estate, "an eventuality which might have been prevented by their failure to survive the grantor."

Reversing, the Court of Appeals observed (p. 172) that the decedent had stripped herself as an individual "of every vestige of beneficial interest in the land and of every power over it. The two unexercised powers here involved were granted to her as trustee, and were subject to the control of a court of equity."[*] The court concluded that the value of the land could not be included in the decedent's estate because, construing the terms of the trust instrument under Mississippi law, it was clear that she had conveyed to the beneficiaries an inheritable estate in fee."

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[*] The suggested distinction between a power exercisable by the settlor as such and by him as trustee is, we believe, clearly immaterial, and is not pressed by petitioners as a basis for their position. Section 811 (d) (1), applying to transfers after June 22, 1936, refers to powers "in whatever capacity exercisable", but the quoted language has been held merely declarative of prior existing law applicable under Section 811 (d) (2) to transfers made on or before June 22, 1936. *Welch* v. *Terhune*, 126 F. 2d 626 (C. A. 1); *Union Trust Co. of Pittsburgh* v. *Driscoll*, 138 F. 2d 152 (C. A. 3); cf. *Commissioner* v. *Estate of Holmes*, *supra*, at 489-490, especially footnote 13, p. 490.

[*] In a decision involving a Minnesota trust, the District Court for the District of Minnesota has followed the Fifth Circuit's decision in *Hays' Estate*, postponing the entry of judgment until the decision of this Court in the instant case. *Barney* v. *Kelm*, 53 CCH, Federal Estate and Gift Tax Reporter, ¶ 10,915 (July 31, 1953).

from the trust created hereby and shall be the absolute property of the payee" (R. 6). There was no express provision of any kind for disposition of the property in the event of a beneficiary's death during the term of the trust.

In petitioners' view, the settlor must be deemed to have intended that, if a beneficiary had died at the age of two or five or ten the property would go to the beneficiary's estate. Or that a beneficiary dying at eighteen could have willed the property to a friend or any chance object of his bounty. But the very first case petitioners cite for this conclusion goes far to refute it.

Manufacturers Trust Co. v. *Chase National Bank*, 282 N. Y. 790, affirming 258 App. Div. 767, affirming 171 Misc. 49, involved an *inter vivos* trust, providing in part as follows (171 Misc. at 49–50):

> Upon the death of [the first life beneficiary, settlor's sister], the said "Trustee" shall divide the trust fund into two (2) equal parts, and shall hold one of such parts in trust for the benefit of my niece, Constance Lichter and apply the income and profits therefrom to her use until she shall attain the age of twenty-five (25) years and in the event that she attains the said age of twenty-five (25) years, she shall thereupon become entitled absolutely to the said equal part * * *.

The close resemblance of the quoted provision for Constance Lichter to the provisions in the instant case is readily apparent.

Constance Lichter died before reaching twenty-five, having received her share of the income until then, and the problem before the New York courts was whether the capital which would have gone to her had she lived to the age of twenty-five should go to her estate or to the estate of the settlor. The Supreme Court, which wrote the only opinion in the case and was affirmed without opinion by the Appellate Division and the Court of Appeals, observed, referring to the trust language we have quoted (171 Misc. at 30):

> If there were nothing more in the trust deed than the clause above quoted it would probably be necessary to hold that the acquisition by Constance Lichter of any right to receive her share of the capital of the trust was contingent upon her attaining the age of twenty-five years, and that in the event of her death before reaching that age the fund would revert to the settlor or his estate.

The court went on, however, to point out that the settlor had contemplated the possibility of Constance's death before reaching twenty-five, had provided for various alternative dispositions (omitting only the eventuality, which materialized, of Constance's death after the prior life beneficiary but before age twenty-five), and had effectively shown by these arrangements an intention which was more nearly fulfilled by giving the fund to Constance's estate than by a reverter to the settlor's estate.

The point here, of course, is that there are no such additional factors, and the statement quoted from the court's opinion squarely applies. Indeed, with *inter vivos* trusts generally, as contrasted with wills, there is sound reason for refusing to "imply an intention of effecting a full and complete disposition of the trust property unless an intention so to do is clearly indicated." *In re Fields' Trust*, 276 App. Div. 835, 836, 93 N. Y. S. 2d 267, 269, modified, 302 N. Y. 202.[11] As Mr. Justice Reed observed, concurring in *Spiegel* v. *Commissioner*, 335 U. S. 701, and dissenting in *Commissioner* v. *Church*, 335 U. S. 632, it is a—

> firmly settled principle that where an express trust fails for lack of a beneficiary, a resulting trust in favor of the settlor arises by operation of law. To vest property under a will or deed is desirable. To vest property under a trust may not be. It is more reasonable to return trust property to the settlor on failure of the trust than to have it go to the heirs of the beneficiary. [335 U. S. at 665.]

This conclusion seems particularly compelling when we consider the tender age of the beneficiaries when the trusts in this case were created

[11] The Court of Appeals, modifying the decision of the Appellate Division from which we have quoted, found a clear indication that the settlor in that case had intended to preclude any possibility of reverter. But it cast no doubt on the relevance in a proper case of the guide to construction referred to in the lower court's opinion.

and the broad powers of control reserved by the settlor. The intention petitioner imputes to the settlor would have channeled the assets potentially through the estate of a deceased infant beneficiary or have left them to pass under the will of a child whose maturity the settlor deemed insufficient to relinquish his control to them. It seems far more likely that the settlor would have preferred that these properties be continued in existence and grant for his children should remain subject to disposition by him should one of the children fail to live to enjoy his share. Paraphrasing this Court's appraisal of the similar problem in *Chater v. Chater*, 293 U. S. 572, 580:

> [The children were] the chief object[s] of the bounty. What [they were] to receive, and when [they were] to receive it, were stated in plain terms. Beyond this, we think there are none of the implications that are deemed to arise in cases of wills.

The conclusion in the *Chater* case is plainly appropriate here; had a beneficiary died before receiving the trust assets, the trust would have failed and there would have been "a resulting trust for [the donor]." *Ibid.*; see also, *Guaranty Trust Co. v. New York Trust Co.*, 297 N. Y. 45, 51; *Furman v. Cruikshank*, 230 N. Y. 425; Bogert, *Trusts and Trustees*, Vol. 2A, Sec. 469.

This view is supported not only by the logical and practical considerations already mentioned but by the rule of construction commonly applied in New York [illegible] of gift are [illegible] may at a [illegible] mediate contingent [illegible] *Crosse*, 164 N. [illegible] to the same effect [illegible] *Will*, 37 N. [illegible] *Estate*, 164 N. [illegible] App. Div. 961.[2] Whatever the [illegible] canon standing alone (see note 15, *supra*), its application in the present case is readily appropriate. The settlor used words of survivorship and the purpose of his transfers was such that, unless he himself saw fit at some time to advance the time for receipt of the property by his children, they were not to have it before the time appointed in the trust instruments. It scarcely comports with this retention of parental control to suppose that the settlor intended, upon the death of one of the children, to let the property pass to the child's estate. The law of New York, far from

[2] In 2 Powell on *Real Property* (1950), par. 382, p. 142, the rule is severely criticized and it is shown to be encountering judicial disapproval in many quarters. However, as indicated by the two cases last cited, decided in 1950 and 1951, the rule survives in New York.

for accumulation in New York must give the beneficiary a vested interest in the sense that, upon surviving his minority, the beneficiary is absolutely entitled to the accumulated income. But it is equally clear that the vested interest may be subject to defeasance. Section 16-a of the New York Personal Property Law provides that a direction for the accumulation of income may be "accompanied by the creation in [a person or persons other than the minor beneficiary] of an interest with respect to, or by the reservation of a reversionary interest in favor of the settlor, or of his successors in, the income accumulated during the minority prior to the time of the death of the minor, provided that the interest so reserved or created is to become effective only in the event of the death of the minor during minority." This provision, enacted in 1948, merely confirmed a rule that had existed long before (see the Historical Note to Section 16-a in McKinney's Consol. Laws of N. Y., Bk. 40, p. 102; and see pp. 42, 43-44, *infra*), and petitioners do not suggest that their decedent lacked the power, if he so intended, to create in himself a possibility of reverter as to the accumulated income. They appear to contend, however, that the decedent should not be deemed to have intended any such possibility.

Of the two cases petitioners cite for their view (Br. 11), one, *Morris* v. *Morris*, 272 N. Y. 110, held merely that an accumulation for anyone other

than a minor was invalid. There is dictum in the case which could be said to suggest that we are but the minor may even benefit from an accumulation, but this is inconsistent and, only with the subsequently enacted Section 16-a of the Personal Property Law (passed in 1949), but also with other pronouncements of the New York Court of Appeals (see pp. 42-43, infra).

The other leading pre-Surrogate Collins, Smith v. Arnold, 140 N. Y. 116, decided in 1893, did involve a minor but his own personal benefit. There, a testator created a trust for his two daughters, directing the trustee to accumulate the income in his discretion until each girl became 21 and to pay each the accumulations and income for life thereafter. Upon the death of either her share was to go to her issue, and, if she left no issue, to the testator's surviving issue. One of the daughters died during minority leaving an issue, and the court held that the income accumulated for her should go to her administratrix and not as a gift over together with her share of the principal. After reaching this conclusion, the court said (140 N. Y. at 121):

> While we rest our decision in this case on the provisions of the will, we are also of opinion that it is the policy of the statute permitting the accumulations of personal property for the benefit of a minor * * * that they should vest in the infant beneficially when received, and it

is only payment over that is postponed until the expiration of the minority.

The Court also pointed out, however (id. at 153), that there was no doubt

> as to the testator's power to make such disposition of the accumulated income of an infant during minority as he might see fit; there is no legal objection to suspending the gift to any person whether a stranger or a kin, any and such a provision in a will would not violate the statute which provides that accumulations must be for the benefit of infants."

Read in its context, in the light of subsequent developments in the law of New York, and of the fact that it involved a will rather than an inter vivos trust, the decision in *Smith* v. *Parsons* does not support petitioners' view that the trust instrument in this case must be construed to have left no possibility of reverter as to the accumulated income in the settlor. At the time of that decision, almost sixty years ago, New York had no statute expressly permitting gifts over and reversions upon death during minority of a beneficiary for whom an accumulation had been directed. On the contrary, there had been some forty years earlier a square decision holding such gifts over invalid. *Harris* v. *Clark*, 7 N. Y. 242

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[1] To the same effect, see *Rea* v. *Vingut*, 117 N. Y. 204, 217; *Hedgman* v. *Cobb*, 202 App. Div. 259, 265; *People ex rel. Frelinghuysen* v. *Graves*, 248 App. Div. 105, affirmed, 272 N. Y. 517; *Willetts* v. *Titus*, 14 Hun. 554; *Matter of Levy*, 238 App. Div. 480.

(1952). So *Smith v. Parsons* was part of the shifting pattern culminating in 1951 in the enactment of Personal Property Law Section 16-a, which cut away the traditional opposition of the policy against accumulations requiring an accumulation to pass as part of a minor's estate. See the def. *Accumulations and Study relating to Effect (Note on Death of Child of Accumulation During Minority of Child)* in the New York Law Revision Commission's Report for 1951, p. 201 et seq. at pp. 215-216.

Since *Smith v. Parsons*, all vestiges of the need to obtain the consent, during accumulations, of persons presumptively born disappeared. Reflecting the development in judicial decisions leading to the result achieved definitely in New York by Section 16-a of the Personal Property Law, the Restatement of Property defines, in Section 406:

> When an accumulations statute provides in effect, that an accumulation is valid only if it is "for the benefit" of the minor whose minority constitutes the outer limits of its duration, that
>
> . . . . .
>
> (b) in the event that the minor dies during his minority, the income so accumulated can either be reserved to the conveyor or limited in favor of some person other than the minor.

Comment as to this section states:

> In the situation described in Clause (b), "... lapse of the minor intervenes to prevent further personal benefit to the minor. The accumulated income must go either as assets of the minor to the intestate (or, in an unusual situation, to the testate) distributees of the minor, who may be persons not of the blood of the original settlor, or to persons selected by the settlor in the provisions of his conveyance. The statute's requirement that the accumulation be "for the benefit" of the minor is not inconsistent with a disposition of the funds accumulated to persons other than the minor, but effective only if the minor shall have died before attaining majority. Personal benefit of the minor having become impossible, the substituted disposition worked by the settlor to be effective if the minor dies, does not violate the policy of these statutes. [Emphasis added.]

It is to be noted, finally, that in *Smith* v. *Parvus*, where a will rather than a deed was involved, the Court, following a general rule of construction, observed (146 N. Y. at 159): "It will be assumed that the testator did not intend to die intestate as to any portion of his estate." That rule, militating there in favor of finding the accumulation indefeasibly vested, has no application here. Indeed, the implications of the

rule support an opposite conclusion in this case. See pp. 26-27, *supra*. For on petitioner's view, the likely result of a beneficiary's death before majority would have been passage of the property to the beneficiary's intestate distributees. Our position, on the other hand, would mean that the settlor, whose concern was focused exclusively on his children and who reserved plenary power to control and enlarge the trust assets, retained the power to dispose of any of the property as to which the objective of his trusts failed.

3. We submit, in sum, that New York law does not provide the basis on which petitioners seek to distinguish the *Holmes* case. Considering the language and circumstances of the trusts involved here, it would seem that they would be held by the New York courts to have created in the beneficiaries interests vested subject to defeasance by failure of survival. It is clear, at the very least, that petitioners have fallen far short of demonstrating that the law of New York provides the ground they invoke for reversing the Commissioner's determination. Cf. *Helvering* v. *Pitch*, 309 U. S. 149, 156; *Helvering* v. *Leonard*, 310 U. S. 80, 84. Accordingly, even if the asserted rules of state law could, if they existed, require a different result, this case is unmistakably controlled by the *Holmes* decision.

CONCLUSION

The decision of the Court of Claims should be affirmed.

Respectfully submitted.

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OCTOBER 1963.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(d) *Revocable Transfers.*—

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or

otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

* * * * *

(26 U. S. C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.20 *Transfers with power to change the enjoyment.*—

(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase

to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or

an interest therein, or as otherwise to inure to the benefit of the person of his estate; he is then deemed the equivalent of a power to "revoke," and when otherwise so exercisable as to affect a change in the enjoyment, is the equivalent of a power to "alter."

(b) *Taxability.* The property or any interest therein transferred as described in subsection (a) shall be included in the gross estate if it comes within any one of the following paragraphs:

(2) If the transfer was made after the enactment of the Revenue Act of 1924 (6 P. M. eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1926 became effective (June 26, 1926), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in connection with persons one or more of whom had and one or more of whom had not such an adverse interest.